

**In the United States
Circuit Court of Appeals
For the Ninth Circuit.**

MARTIN TROGLIA,

Plaintiff in Error,

vs.

THE BUTTE SUPERIOR MINING COM-
PANY, a Corporation,

Defendant in Error.

In Error to

*The District Court of the United States for the Dis-
trict of Montana.*

TRANSCRIPT

WALKER & WALKER and

C. S. WAGNER,

Attorneys for Plaintiff in Error,

307 Daly Bank Bldg.,

Butte, Montana.

No. _____

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*In the District Court of the Second Judicial District
of the State of Montana, in and for the
County of Silver Bow*

MARTIN TROGLIA,

Plaintiff,

vs.

COMPLAINT.

THE BUTTE SUPERIOR MINING COM-
PANY, a Corporation,

Defendant.

I.

At all times herein mentioned plaintiff was the father of John Troglia, a minor child 11 years of age, and the defendant was and is a corporation organized and existing under and by virtue of the laws of the State of ~~Arizona~~^{Montana} and doing, inter alia, a general mining and milling business in Silver Bow County, Montana.

II.

Plaintiff alleges he brings this action against the defendant for damages for the death of his said minor child on or about the 13th day of June, 1918, approximately caused by the wrongful and negligent acts of the defendant, as hereinafter set forth.

III.

Plaintiff alleges that prior to and on the 13th day of June, 1918, the defendant herein did keep and maintain an artificial dam or reservoir located, and being

about one mile north of Meaderville in said county and state, to supply its mill with water, which said artificial dam and reservoir was of the following dimensions, to wit: About 100 feet long and about 75 feet wide, and varying in depth from 1 to 12 feet, and which had been prior thereto and was on said day filled with water. That said artificial dam and reservoir was not enclosed prior thereto or on said day with any fence or other barrier, but then was, and prior thereto had been, wholly unenclosed and open to the public generally, and on said day the said defendant carelessly and negligently suffered and permitted said artificial dam and reservoir to so be and remain open and exposed, and no watchman or person to warn minor children against trespassing was kept or maintained at or near said artificial dam and reservoir, or at all.

IV.

That said artificial dam and reservoir is contiguous to, and in close proximity with, a public highway, to wit, 25 feet therefrom, upon and over which, and upon and over the contiguous and adjacent lands many children passed to and fro at ~~all~~ ^{the} times herein ~~alleged~~ ^{mentioned}, particularly the son of plaintiff, John Troglia above mentioned, and his youthful companions and playmates. That said artificial dam and reservoir so, as afore-said, carelessly and negligently kept and maintained by the defendant, became and was an enticing and alluring attraction to children generally as a swimming hole or bathing pond, and many children of

the neighborhood including plaintiff's said son, John Troglia, did at divers times prior to the 13th day of June, 1918, go swimming or bathing at and in said artificial dam and reservoir, all of which was well known to the defendant, or by the exercise of ordinary care would have been known to it.

V.

That the said artificial dam and reservoir is fed from the waters of a creek or channel whose source of supply is found in the melting snows of the highlands nearby, and during the month of June of each year, and particularly during the month of June, 1918, the waters entering and contained in said artificial dam and reservoir were cold, chilly and of low temperature, to wit, of the temperature of 40 or 50 degrees Fahrenheit, all of which was well known to the defendant or which, by the exercise of ordinary care, would have been known to it.

VI.

That by virtue of the premises, the defendant well knew, or by the exercise of ordinary care would have known, that the said artificial dam and reservoir so, as aforesaid, kept and maintained by it was a dangerous instrumentality peculiarly attractive to children of tender years, and in its exposed and unguarded condition would, and did, allure children of tender years thereto, among them plaintiff's said minor son, John Troglia, for the purpose of making use of the same for swimming and bathing purposes, yet, notwithstanding the premises, the defendant failed and

neglected to use ordinary care, or any care at all, to prevent children, and particularly the minor son of plaintiff, John Troglia, from making use of the said artificial dam and reservoir for swimming and bathing purposes, but carelessly and negligently suffered and permitted children, among them plaintiff's said minor son, John Troglia, to so make use of said artificial dam or reservoir for bathing and swimming purposes.

VII.

That on the 13th day of June, 1918, defendant knew, or by the exercise of ordinary care would have known, that plaintiff's said minor son, John Troglia, and his playmates and companions were lawfully upon the premises of defendant at said artificial dam and reservoir by and through an invitation implied by law, for that the said minor son of plaintiff, John Troglia, and his playmates and companions were on said day lured thereto by the peculiar and tempting attractiveness of the said artificial dam and reservoir as a swimming pool or bathing pond, that it then became and was the legal duty of defendant to warn plaintiff's said minor son and his playmates and companions of the dangers attendant upon going in swimming in the deep and cold waters of said artificial dam and reservoir and to forbid its use for such purposes and to order plaintiff's minor son, John Troglia, and his playmates and companions from the said artificial dam and reservoir and the premises of the defendant. But the said defendant on said day carelessly and negligently suffered and permitted the said

minor son of the plaintiff, John Troglia, and his companions and playmates to go in swimming in the deep and cold waters of said artificial dam and reservoir, and while the said minor son of plaintiff, John Troglia, was so suffered and permitted to bathe in said deep and cold waters by and through the implied invitation of defendant, and by its careless and negligent acts, as aforesaid, the body of the said minor son of plaintiff, John Troglia, sank therein and he was drowned and he died therein.

VIII.

That the death of the said minor son of plaintiff, John Troglia, was proximately caused by the careless and negligent acts of defendant, as aforesaid, in suffering and permitting, and in failing to prevent, minor children to swim and bathe in the said artificial dam and reservoir, among them ~~and~~^{the} said John Troglia, and in suffering and permitting said artificial dam and reservoir to be and remain upon its premises in an open, exposed and unguarded condition while knowing, or by the exercise of ordinary care it would know, the same to be a dangerous instrumentality, and it was a dangerous instrumentality peculiarly attractive and alluring to minor children, and that by the implied invitation of the defendant, as aforesaid, it did entice and lure minor children, amongst them the said minor son of plaintiff, John Troglia, as aforesaid, to his death on said 13th day of June, as aforesaid, and whose death could have been prevented by the use and exercise of ordinary care by the defendant.

IX.

Plaintiff alleges that he was required to pay and did pay the sum of, to wit, seven hundred (\$700.00) dollars to conduct the funeral and to inter and bury the remains and dead body of his said minor son, John Troglia, and that the sum so expended was the reasonable value of the services rendered for such purposes in the said County of Silver Bow.

X.

Plaintiff further alleges that by reason of the loss of the love, companionship and services of his said minor son, John Troglia, through his death by drowning occasioned by the careless and negligent acts of the defendant, he has suffered damage in the sum of twenty-five thousand (\$25,000.00) dollars.

WHEREFORE, plaintiff prays judgment against the defendant in the sum of twenty-five thousand seven hundred (\$25,700.00) dollars.

WALKER & WALKER and
C. S. WAGNER.

Duly verified.

(TITLE OF COURT AND CAUSE.)

DEMURRER.

Comes now the defendant above-named, Butte and Superior Mining Company, sued in said action as The Butte Superior Mining Company, a corporation, and demurs to the complaint of plaintiff herein on file, and for ground of demurrer alleges:

That said complaint does not state facts sufficient to constitute a cause of action against the defendant.

KREMER, SANDERS & KREMER,
Attorneys for Defendant.

United States District Court, Montana.

TROGLIA,

vs.

MINING Co.

It is believed the complaint meets the requirements of a cause of action upon its theory. 53 Mont. 152 U. S. 262. Demurrer overruled, 10 days for answer.

BOURQUIN, J.

(TITLE OF COURT AND CAUSE.)

ANSWER.

Comes now the above-named defendant and for answer to plaintiff's complaint herein, admits, denies and alleges:

I.

Admits the allegations contained in paragraph I of plaintiff's complaint.

II.

Answering the allegations contained in paragraph II of plaintiff's complaint, this defendant admits that the plaintiff has brought this alleged action for the alleged death of his said minor child on or about the 13th day of June, 1918, but denies that said death was

approximately or at all caused by the wrongful or negligent or any act or acts of the defendant as set forth in plaintiff's complaint, or at all.

III.

Answering the allegations contained in paragraph III of plaintiff's complaint, admits that the said defendant prior to and on the 13th day of June, 1918, kept and maintained an artificial dam or reservoir located and being about a mile north of Meaderville, in Silver Bow County, Montana, to supply its mill with water; admits that said dam and reservoir was of the approximate dimensions of 100 by 75 feet and varied in depth from 1 to 12 feet or thereabouts; admits that said dam and reservoir was prior to and on the 13th day of June, 1918, filled with water; denies that said artificial dam or reservoir was not inclosed prior thereto or on said day by any fence or other barrier; denies that said dam was open to the public generally, or at all, and denies that on said day or at all the said defendant carelessly or negligently suffered or permitted said artificial dam or reservoir to be or remain open or exposed, and denies that no watchman or person to warn minor children, or others, against trespassing was kept or maintained at or near said artificial dam or reservoir; but in this connection this defendant avers that there was at said place at all times in the employ of the defendant an employe of the said company who protected said property against trespassers and who repeatedly warned children and others against trespassing upon

or in said dam or reservoir, and who particularly warned the minor child of the plaintiff, to-wit: John Troglia; but that notwithstanding such repeated warning the said John Troglia and his associates continued trespassing upon and in said premises.

IV.

Answering the allegations contained in paragraph IV defendant admits that said artificial dam and reservoir is approximately 25 feet from a public highway, but in this connection avers that said public highway is seldom used and few people traverse the same; denies that over or upon said public highway or upon or over the contiguous or adjacent lands many children passed to and fro at the time mentioned in plaintiff's complaint, or at all; but in this connection avers that few, if any, children traversed said public highway save and except children trespassing upon the property of the defendant against the will and contrary to the wishes and warnings of the said defendant, notwithstanding the fact that the defendant had used reasonable care and caution to prevent said children trespassing upon its said property; denies that said highway was particularly used by said John Troglia, or his youthful companions or playmates, except when the said John Troglia and his companions or playmates were trespassing upon the premises of the defendant notwithstanding the protests of the said defendant and notwithstanding that the defendant actually protested against the said trespass and actually drove the said John Troglia and his playmates there-

from; denies that said artificial dam or reservoir was carelessly or negligently kept or maintained by the defendant; denies that the same became or was an enticing or alluring attraction to children or to children generally as a swimming pool or bathing pond, or at all, or that many, or any, of the children of the neighborhood or elsewhere, including plaintiff's minor son, John Troglia, or any other person, did at divers or any time prior to the 13th day of June, 1918, go swimming or bathing at or in said artificial dam or reservoir except when the said defendant was unable to prevent the same by the use of ordinary care and diligence and against the will of the defendant, and in this connection defendant avers that it repeatedly drove the said John Troglia and his companions and other children from said premise through the agency of the person charged with the responsibility of protecting the said property of the said defendant against trespass, and particularly with the duty of preventing children and others from encroaching upon said premises; denies that all or any of said alleged acts of the said John Troglia and his associates, save as herein set forth, were well or at all known to the defendant, or by the exercise of ordinary care would have been known to it, and in this connection defendant avers that it at all times protested against the said trespass of the said John Troglia and his companions and frequently drove them from the said premises as aforesaid.

V.

Answering the allegations contained in paragraph

5 defendant admits that said artificial dam or reservoir is fed from the waters of a creek or channel whose source of supply is found in the melting snows of the mountains nearby; denies that during the month of June of each year, or particularly during the month of June, 1918, the waters entering or contained in said artificial dam or reservoir were cold or chilly, or of low temperature, or were of the temperature of 40° to 50° Fahrenheit; denies that it was well known to the defendant or would have been known to the defendant by the exercise of ordinary care on its part that the said waters were of such temperature; denies that the waters during the month of June, 1918, and particularly on the 13th day of June, 1918, were of any lower temperature than 60° Fahrenheit.

VI.

Denies that the said defendant well or at all knew, or by the exercise of ordinary care, or any care, would have known that the said artificial dam or reservoir kept or maintained by it was a dangerous instrumentality particularly or at all attractive to children of tender, or any, years; denies that the said dam or reservoir was or is an instrumentality particularly attractive to children of tender, or any years; denies that said dam or reservoir in its alleged exposed or unguarded condition would or did allure children of tender or any years thereto, or among them plaintiff's said minor son, John Troglia, for the purpose of making use of the same for swimming or bathing purposes, or otherwise, but in this connection states that

contrary to the will and wish and warnings of defendant and notwithstanding the fact that he had been repeatedly driven therefrom the said John Troglia did attempt to use the same for swimming or bathing purposes; denies that the defendant failed or neglected to use ordinary care or care of any kind to prevent children, or particularly the minor son of plaintiff John Troglia of making use of said artificial dam or reservoir for swimming or bathing purposes, but in this connection defendant avers that it used every means possible for preventing the use of the same for said purposes by the said John Troglia and other children by repeatedly warning them to remain away from said premises and driving them therefrom; denies that the said defendant carelessly or negligently suffered or permitted children or other persons or particularly plaintiff's minor son John Troglia, to make use of said artificial dam or reservoir for bathing or swimming purposes, but in this connection this defendant specifically alleges that it did not suffer or permit children or any person or persons or the plaintiff's minor son John Troglia to make use of said artificial dam or reservoir for bathing or swimming purposes, but particularly forbade swimming or bathing in the same.

VII.

Denies that on the 13th day of June, 1918, defendant knew, or by the exercise of ordinary care, would have known, that plaintiff's minor son John Troglia, or his playmates or companions, were lawfully upon

the premises of plaintiff at said artificial dam or reservoir by or through an invitation implied by law, or otherwise; denies that the said John Troglia, or his playmates or companions, were upon said premises lawfully or by or through an invitation implied by law or at all; denies that on said day the said John Troglia or his playmates or companions were lured thereto by the peculiar or tempting or any attractiveness of said artificial dam or reservoir as a swimming pool or bathing pond, or otherwise; denies that it became or was the legal duty or any duty of defendant to warn said plaintiff's said minor son or playmates or companions, of the dangers, if any, of going in swimming in the deep or cold waters of said artificial dam or reservoir; but in this connection avers that it did warn children against going in swimming in sad waters and did repeatedly drive them from the said premises; denies that it was the duty of the said defendant to forbid its use for said purpose or to order plaintiff's minor son John Troglia or his playmates or companions from the artificial dam or reservoir or the premises of the defendant, but in this connection defendant particularly avers that it did forbid its use for said purpose and did order plaintiff's minor son John Troglia and his playmates from the said dam and reservoir and from the said premises of defendant; denies that said artificial dam or reservoir was tempting or attractive as a swimming pool or bathing pond, but avers that the said artificial dam or reservoir was not attractive as a swimming pool

or bathing pond, but notwithstanding that fact upon the said day the said John Troglia trespassed upon said premises against the will and wish of the said defendant and was drowned in said pond; denies that the said defendant on said day, or any other day, carelessly or negligently suffered or permitted the said minor son John Troglia or his companions or playmates to go in swimming in the said deep or cold or any waters or any waters of said artificial dam or reservoir, or at all; denies that said waters were cold; denies that while the said minor son of plaintiff John Troglia was suffered or permitted to bathe in said deep or cold waters or any water, or at all, by or through the alleged implied, or any invitation of defendant or by the alleged careless or negligent acts of the defendant, or at all, the body of the said minor son of plaintiff John Troglia sank therein or was drowned or he died therein; denies that said waters were cold; admits that the said John Troglia was drowned in said artificial ~~pond~~^{pool} or reservoir and died therein, but defendant avers that it was not through any act of carelessness or negligence on the part of the defendant.

VIII.

Answering the allegations contained in paragraph 8 this defendant denies that the death of the said minor son of plaintiff John Troglia was proximately or at all caused by the careless or negligent act or acts of defendant in suffering or permitting or in failing to prevent minor or any children to swim or bathe in

said artificial dam or reservoir (among them the said John Troglia), or in suffering or permitting said artificial dam or reservoir to be or remain upon its premises in an open or exposed or unguarded condition, or otherwise, or at all; denies that the said defendant knew or by the exercise of ordinary care would have known the same to be a dangerous instrumentality; denies particularly that it was a dangerous instrumentality peculiarly or at all attractive or alluring to minor or any children; denies that by the alleged implied invitation or any invitation of the defendant, it did entice or lure minor or any children, among them the said minor son of plaintiff John Troglia to his death on said 13th day of June aforesaid, or any other time; denies that the said death could have been prevented by the use of exercise of ordinary care by the said defendant, and in this connection the said defendant particularly denies that it was guilty of any careless or negligent act whatsoever, or that it did suffer or permit the minor son of the plaintiff to bathe in said dam or reservoir; denies particularly that it failed to guard or protect said reservoir; denies particularly that said dam was an instrumentality particularly attractive or alluring to minor or any children; and in this connection defendant avers that it guarded said dam and reservoir by human agency so as to prevent trespass thereon by any persons ^{whom} ~~what~~soever, but that notwithstanding the same the said John Troglia did trespass thereon.

IX.

Answering the allegations contained in paragraph IX denies that it has any knowledge or information thereof sufficient to form a belief.

X.

Answering the allegations contained in paragraph X, defendant denies that by reason of the loss of the love or companionship or services of said minor son of plaintiff John Troglia through his death by drowning, the said plaintiff has suffered damages in the sum of Twenty-five Thousand (\$25,000.00) Dollars, or any other sum, or at all; denies particularly that said death was occasioned by any carless or negligent act or acts of the defendant, and denies that by reason of any carless or negligent act or acts of the defendant the said plaintiff has suffered damage in the sum of Twenty-five Thousand (\$25,000.00) Dollars, or any other sum, or at all.

XI.

Further answering plaintiff's complaint, defendant denies each and every allegation therein contained not hereinbefore specifically admitted or denied.

XII.

Further answering plaintiff's complaint, this defendant alleges that the said plaintiff, Martin Troglia, was and is the father of the said John Troglia, a minor of the age of eleven (11) years referred to in plaintiff's complaint; that the said Martin Troglia was guilty of carelessness and negligence in not forbidding said John Troglia from exposing himself to the

danger of trespassing upon and swimming in the artificial dam or lake constructed by the defendant upon its said premises for the purpose set forth in plaintiff's complaint and the character of which plaintiff well knew or could have known by the exercise of ordinary care and diligence; that the said Martin Troglia, as father and guardian and protector of said child, negligently and carelessly permitted the said John Troglia to enter upon said premises of the said defendant and swim in said artificial pond or lake, and that the said Martin Troglia, by the exercise of ordinary care could have prevented the said John Troglia from swimming in said artificial lake, and thereby could have prevented the said John Troglia from drowning therein, the said Martin Troglia knowing or by the exercise of ordinary care and diligence could have known that said John Troglia was trespassing and swimming in said artificial dam or reservoir, and that had the said Martin Troglia not been guilty of the said negligent and careless acts in so permitting or causing his son to trespass upon and swim in said artificial lake, the death of the said John Troglia would not have happened by drowning in said artificial lake aforesaid; that it was the duty of the said Martin Troglia to shield his said minor child from danger and by failing to prevent the said John Troglia from trespassing upon the premises of plaintiff and swimming in said artificial dam or lake, the said Martin Troglia contributed to the injury and death of his said child and that the said Martin Troglia thereby became

i pari delicto by reason of his said carless and negligent acts.

WHEREFORE, defendant having fully answered prays that it be dismissed hence with its costs.

KREMER, SANDERS & KREMER,
Attorneys for Defendant.

Duly verified.

(TITLE OF COURT AND CAUSE.)

REPLY.

Now comes the plaintiff above named and for reply to the answer of the defendant on file herein admits, denies and alleges:

I.

Denies as alleged in paragraph three of said answer that at the time and place alleged the said defendant protected the said property against trespassers or warned children and others against trespassing upon or in said dam or reservoir, and denies the said defendant particularly or at all warned the minor child of plaintiff, John Troglia, and denies that, notwithstanding such alleged warning, the said John Troglia and his associates continued trespassing upon or in said premises.

II.

Replying to the allegations of paragraph four of said answer, plaintiff denies that the said John Troglia and his youthful playmates and companions were trespassing upon the property of the defendant and

against the will and contrary to the wishes and warnings of the defendant or at all, and alleges in this connection that the defendant failed to use reasonable care and caution to prevent said children trespassing or entering into and upon the said premises, and at all times alleged in said complaint the said John Troglia and his youthful playmates and companions were at and upon said premises by the implied invitation of the defendant as alleged in plaintiff's complaint, and denies that the said defendant actually protested or protested at all against any trespass or drove the said John Troglia and his playmates and companions, or any or either of them, therefrom.

III.

Replying to the sixth paragraph of defendant's answer, this plaintiff denies that the said John Troglia and his playmates or companions, or any or either of them, were upon the premises of the defendant, as alleged in the answer, contrary to the will and wish and warnings of the defendant, or otherwise, than by the implied invitation of the defendant as alleged in plaintiff's complaint, and denies that the said John Troglia had been repeatedly driven therefrom, and denies that the defendant used every means possible, or reasonable means, or any means at all, for preventing the use of the said artificial pond and reservoir for swimming and bathing purposes.

IV.

Replying to the seventh paragraph of defendant's answer, this plaintiff denies that the defendant did

forbid the use of said artificial dam and reservoir for swimming and bathing purposes, and denies that he did order plaintiff's minor son, John Troglia, and his playmates and companions from said dam and reservoir and from the premises of the defendant.

V.

Replying to the 8th paragraph of ~~the~~ defendant's answer, this plaintiff denies that the defendant guarded the said dam or reservoir, and denies that the said John Troglia did trespass thereon, but avers that the said John Troglia was lawfully upon the premises of the defendant at the times alleges in the complaint of plaintiff by and through the implied invitation of the defendant.

VI.

Replying to the 12th paragraph of defendant's answer, this plaintiff denies that he was guilty of carelessness or negligence in not forbidding the said John Troglia from exposing himself to the dangers attendant upon going in swimming or using the said artificial pond or reservoir for swimming or bathing purposes, and denies that this plaintiff carelessly or negligently permitted his said son, John Troglia, to enter upon said premises of the said defendant and swim in the ~~said~~ artificial pond or lake, and denies that plaintiff by the exercise of ordinary care or any care could have prevented the said John Troglia from drowning therein, and denies that this plaintiff by the exercise of ordinary care or diligence, or any care or diligence at all, could or would have known that his

was or would trespass or ruin in the said artificial
said minor son would not have happened in said artificial dam or reservoir if this plaintiff had used ordinary care and diligence to prevent his said son from swimming or bathing therein, and denies that plaintiff contributed in any degree to the injury or death of his said child, and denies that plaintiff became or was in pari delicto in any degree whatsoever by reason of any careless or negligent acts upon his part, ~~etc~~^{or} at all, and alleges that the death of his said minor son was proximately caused as alleged in his complaint.

WHEREFORE, plaintiff having fully replied to the answer of the defendant on file herein prays judgment according to his complaint.

Attorneys for Plaintiff.

Duly verified.

(TITLE OF COURT AND CAUSE.)

Friday, November 21st, 1919.

Before Hon. G. M. Bourquin, Judge, and a Jury.

Appearances:

For Plaintiff,

WALKER & WAGNER.

For Defendant,

KREMER, SANDERS & KREMER.

^R
TRANSCRIPT OF TESTIMONY.G. H. MACDOUGALL, Reporter.

Be it remembered that this cause came regularly on for hearing before the above entiled court of Friday, Nov. 21st, 1919, before Hon. G. M. Bourquin, Judge of said court; the plaintiff being present in person and by counsel, Walker, Walker, ~~Walker~~ & Wagner, Esq. The defendant being present by counsel, Kremer, Sanders & Kremer, Esqs. Whereupon a jury having been duly impanneled and sworn to try the cause the following proceedings were had to-wit:

By the consent, and by permission of the court, the first paragraph of plaintiff's complaint was amended by inserting the words "Arizona," instead of "Montana," on the fourth line thereof.

MARTIN TROGLIO,

Plaintiff, after being duly sworn in his own behalf, testified as follows:

DIRECT EXAMINATION.

BY MR. WAGNER:

Q. State your name, age and residence to the stenographer.

A. Martin Troglia, Meaderville, Montana, 8 Webster street.

Q. You are the plaintiff in this action, are you?

MR. SANDERS: If your Honor please, at this time the defendant desires to object to any testimony in the case in support of the allegations of the complaint, on the following grounds and for the following reasons, to-wit:

That the complaint does not state facts sufficient to constitute a cause of action, nor does it state actionable negligence against the defendant. That the artificial dam and reservoir mentioned in plaintiff's complaint was not such an attractive nuisance or alluring attraction as to bring it within the rule that renders a person liable to children of tender years, or to the plaintiff in this case for maintaining such dam and reservoir as charged in plaintiff's complaint as being an attractive nuisance; that the defendant was not guilty of actionable negligence in maintaining the same unenclosed by a fence or other barrier, or for suffering or permitting the same to remain open or exposed without watchmen or persons to warn minor

children, or particularly plaintiff's minor son, against trespassing at, near or in the same. That the artificial dam or reservoir mentioned in plaintiff's complaint was not such a dangerous instrumentality as comes within the doctrine of attractive nuisances, whereby children of tender years are allured thereto to their injury or death.

The attorneys for both sides agree that if this complaint does not state facts sufficient to constitute a cause of action as an attractive nuisance, a complaint can not be drawn referring to reservoirs which does. It seems to me it would be well to discuss the law.

THE COURT: No; I will overrule the objection at present and we can take it up again.

To which ruling of the Court in overruling said objection, defendant, by counsel, then and there duly excepted.

Q. You are the plaintiff in the case?

A. Yes, sir.

Q. Did you know of the existence of the swimming pond which is mentioned in this complaint prior to the time your son was drowned in it?

A. I never went up there before and I never saw that dam before. Even at that day he was drowned I never went there.

Q. Your boy was drowned in that dam, was he?

A. He was drowned in the dam.

Q. Do you remember the date?

A. The date was the 13th of June, 1917.

Q. How old was your boy at that time?

A. Eleven years old.

Q. What was he doing then, going to school or what?

A. Well, he had just quit the school.

Q. Do you remember the day that school closed?

A. Well, I dont remember exactly; I think the school closed on the 10th of June.

Q. Do you know, and did you know at that time that your boy was going in swimming at this pond?

A. No, I never knowed he was going up there, for I never knowed the dam was built.

Q. What was your occupation at that time?

A. Well, I was sick; I could not work, and I was home; I was helping a fellow raise up the house, just showing him to raise up the house. I couldn't work no more and I was sick, and he came there and asked me to show him how to raise the house, and I was doing that.

Q. When did you first learn that your boy was drowned in the dam?

A. Well, they sent down a little kid, smaller than him to buy something in the store, and he came back with nothing, and he came back and says: "Papa, John is pretty near dead."

Q. Just tell when you learned about it; you learned about it shortly after the boy was drowned.

A. Yes, I just know about five o'clock in the evening.

Q. And you buried the boy, did you; you had a funeral, did you?

A. Yes, I had a funeral.

Q. Do you recall what it cost you to bury the boy?

A. It cost me about five hundred dollars or more.

Q. That was the charge that was made for the funeral services was it?

A. Well, I didn't pay all the funeral expenses myself; the older boy is in the mine; he was doing the paying.

Cross-examination waived.

Witness excused.

JOSEPH BERTOGLIO,

A witness for plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. WAGNER:

Q. State your name, age and residence to the stenographer.

A. Joseph Bertoglio, 63 Elm street; age fifteen.

Q. Did you know the little Troglia boy?

A. Yes, sir.

Q. The one that was drowned in the dam?

A. Yes, sir.

Q. Were you present at the time that he was drowned?

A yes sir.
Q. Now, just state to the Court and jury what happened.

A. Well, we were there going in swimming, and

we got out, and me and another boy—another of my playmates were dressing up, and all of a sudden we heard two of them calling for help, and we went to get the one that was closest, and before we had time to get him he was down already.

Q. How long were you there that day?

A. Just about half an hour.

Q. Do you know how long John Troglio had been in swimming before he drowned?

A. No, sir.

Q. How long had you seen him there?

A. As soon as I came from school I went there. They did not go to school that day.

Q. You saw John's body sink in the water, did you?

A. Yes, sir.

Q. Did he say anything before he drowned?

A. Just hollered twice: "Help".

Q. Who else was in the dam at the time?

A. Well, that other boy that was drowned in there; they were the only two.

Q. How many boys were in swimming there that day?

well I don't know
Q. Can you estimate how many boys were in there?

A. Eleven or twelve.

Q. Had you been in swimming yourself?

A. Yes, sir.

Q. How many times had you been in swimming there before that time?

A. That season?

Q. How many boys had you seen in swimming in there?

A. Oh, pretty many.

Q. That season, yes.

A. I had been there two times before.

Q. Was there a watchman or a boss around there?

A. There was just a pumpman there.

Q. Was anybody in charge of the dam?

A. I don't know.

Q. What was the closest place where an employe of the Butte & Superior was?

A. Well, in the pump room.

Q. How far is that from the dam?

A. Fifteen or twenty yards.

Q. Did that man ever protest against the boys swimming in the dam?

A. Not while I was there.

MR. KREMER: That is objected to on the ground that it is negative testimony.

Which objection was by the Court overruled.

To which ruling of the Court in overruling said objection, defendant, by counsel, then and there duly excepted.

Q. Did the watchman there at the station consent to the boys going in swimming?

A. He never said nothing.

MR. KREMER: That is objected to as calling for a conclusion.

THE COURT: The objection is overruled. The

answer that he already made manifested that he understood the question.

Q. What did the boys usually do when they went in swimming there?

MR. SANDERS: That is objected to as assuming a state of facts not shown. There is no testimony that they usually went in swimming.

Which objection was by the Court overruled.

To which ruling of the Court in overruling said objection, defendant, by counsel, then and there duly excepted.

MR. SANDERS: For the preservation of the record we also desire to object to any testimony tending to establish the fact that boys congregated at or near the reservoir or ever entered it, as incompetent, irrelevant and immaterial under the allegations of this complaint, for the reason that the artificial dam and reservoir was not such an attractive nuisance as to bring it within the rules which render a person liable to children of tender years or to the plaintiff in this case for maintaining the dam as an attractive nuisance.

Which objection was by the Court overruled.

To which ruling of the Court in overruling said objection, defendant, by counsel, then and there duly excepted.

A. They just swim around, and sometimes I have seen them when they used to be cold, they used to go in and get warm in the pump room.

Q. Did the watchman or the man in charge of the pump station there know that the boys went in swimming?

A. Yes, sir.

Q. Did he ever protest against it?

A. No, sir.

Q. I will ask you to state if it is not a fact that the boys who went in swimming in that pond frequently went to the pump station to get warm while they were disrobed?

MR. SANDERS: That is objected to on the ground that it is leading.

THE COURT: The objection is sustained. He has already answered that they did and that is enough, without repetition.

Q. Was there any enclosure around this pond?

A. No, sir.

Q. Was it near a public highway?

MR. SANDERS: We object to this character of testimony with respect to an enclosure or fence for the reason that, in view of the character of the alleged attractive nuisance, the same being a reservoir, that there was no legal duty imposed by the law upon the defendant to close the reservoir by a fence, or to refrain from permitting it to remain open or unenclosed, nor was there a duty devolved by law on the defendant to maintain a watchman to prevent minor children or the deceased son of the plaintiff herein from entering the reservoir for the purpose of swimming or otherwise.

THE COURT: All those matters will be determined from all the testimony and evidence in the case. At this time the objection is overruled.

To which ruling of the Court in overruling said objection, defendant, by counsel, then and there duly excepted.

A. Yes, sir.

Q. How far was the public road from this dam or reservoir?

MR. SANDERS: That is objected to on the ground that it is incompetent, irrelevant and immaterial.

Which objection was by the Court overruled.

To which ruling of the Court in overruling said objection, defendant, by counsel, then and there duly excepted.

A. In one place it was about ten yards, probably out where the stream was coming in; and if you go down closer it was about fifteen.

Q. Do you know whether or not that public road was travelled very much?

A. No, sir.

Q. Where did the public road lead to?

A. It led up to just a few mines that was up there.

Q. Please mention the points and the places that this highway led to.

MR. SANDERS That is objected to on the ground that it is immaterial. It is not a proximate cause or a proximate issue in this case, the presence or absence of a public road.

Which objection was by the Court overruled.

To which ruling of the Court in overruling said objection, defendant, by counsel, then and there duly excepted.

A. It led to the Butte & Bacorn min, and to the Butte & Great Falls, and a ranch.

Q. How frequently during 1918, prior to the 13th of June, did the boys go swimming there?

MR. SANDERS: To which we object on the ground that there was no duty that devolved upon the defendant in this case to protect the pond from intrusion by boys, nor was this such an attractive nuisance as comes within the law as to attractive nuisances. With the understanding and consent of counsel, we will refrain from further objections, and may it be inserted in the record that all this line of testimony is deemed introduced over this objection?

THE COURT: If there is no duty, and none is proven, your case is won without a single objection. You may put in as many as you please or desire. The objection is overruled.

To which ruling of the Court, in overruling said objection, defendant, by counsel, then and there duly excepted.

A. That season they had started going there about two weeks. Some kids were going there two weeks already.

Q. Do you know whether the boys that went swimming there were forbidden to swim in the pond?

A. No, sir.

MR. SANDERS: That is objected to on the ground that it is repetition.

THE COURT: Well, I don't know. He spoke of the pumpman and no one else. The answer may stand.

To which ruling of the Court in overruling said objection, defendant, by counsel, then and there duly excepted.

Q. Did the watchman at the pump station permit the boys to go in swimming there?

MR. SANDERS: That is objected to on the ground that it is repetition.

Which objection was by the Court sustained.

To which ruling of the Court in sustaining said objection ^{plaintiff} by counsel, then and there duly excepted.

CROSS EXAMINATION.

BY MR. KREMER:

Q. How many times had you been there before the 13th of June with young Troglia, the boy that was drowned?

A. Twice.

Q. Was he an intelligent boy?

A. ^{Yes, sir.}
Q. In what grade was he at school?

A. I don't know.

Q. Could he read, do you know?

A. I think he did.

Q. Did you see signs there?

A. Yes, sir.

Q. Just tell the jury what kind of signs they were and what was upon the signs?

A. One sign there was "No trespassing," and the other one was "Private Property," and the other one was "Ten feet deep; keep off."

Q. And you saw the Troglia boy drown, did you not?

Q. How far did drown from the place where this sign was "Danger, ten feet deep; keep out."?

A. I don't know.

Q. Well, do you know where the sign was?

A. Well, I don't remember exactly now.

Q. Can you tell us about how far it was; just your best judgment; how many feet?

A. I don't know.

Q. Ten feet?

A. I don't know.

Q. Well, I don't want to argue with you, but was it closer to ten or fifteen feet where this sign was?

A. Well, it was just about fifteen or sixteen feet.

Q. And you had been swimming in there, in that deep water?

A. Yes, sir.

Q. And you had been swimming that day with young Troglia?

A. Yes, sir.

Q. Could he swim?

A. Yes, sir.

Q. He was a fairly good swimmer, was he not?

A. Well; he could swim.

Q. Had you boys been driven off of there that day?

A. No, sir.

Q. Now, do you remember a raft that somebody built and put on that pond?

A. Well, I remember the raft, yes, sir.

Q. Do you remember who broke it up?

A. No, sir.

Q. You know it was broken up, dont you?

A. No, sir.

Q. Didn't you see the broken raft lying there on the side of the bank?

A. No, sir.

Q. Just tell us what day—you say you had been there twice before this day during that year?

A. Yes, sir.

Q. And how many days before the 13th was the day that you made your last visit before this day that the boy was drowned?

A. I went there twice after school.

Q. And about how far apart were those visits?

A. I don't know.

Q. Was Troglia there both days?

A. I just saw him the last day.

Q. How do you know that boys had been going there for two weeks before this day, if you had only been up there twice?

A. Because the boys told me they were going swimming.

Q. Just what the boys told you. Just tell us what you know yourself, Joseph. Now, do you remember the sheriff going down there?

A. Yes, sir.

Q. And running everybody out of there?

A. He didn't run them out of there; he just told them to wear tights.

Q. The sheriff told them to wear tights?

A. Yes, sir.

Q. Do you know Mr. Melia?

A. No, sir.

Q. He was the man that came there.

A. No; Mr. ~~E~~^Borich came there.

Q. Borich and Melia both came there?

A. No; they told us we had to wear tights when we went in swimming.

Q. You were there when they were there?

A. Yes; that was the season before.

Q. It was not this season?

A. No, sir.

Q. As a matter of fact, the season before the place was nothing like the condition it is in today or was in 1918?

A. No, sir.

Q. The condition is entirely different there?

A. Yes, sir.

Q. Between 1917 and 1918 the whole dam had been built there, had it not?

A. Yes, sir.

Q. And the whole condition had been changed.

A. Yes, sir.

Q. It was in the spring, wasn't it, that they built that dam, the spring of 1918

?A. Well, I don't know when they built it.

Q. But it was after the swimming season, as you boys call it, the summer time

A. The season before that they had started to build it already.

Q. But the water was nothing like it was on the 13th of June, 1918?

A. No, sir.

Q. Just describe those signs to the jury; were they on signs painted upon white boards in big, black letters?

A. Yes, sir.

Q. All of them?

A. Yes, sir.

Q. There was one over by the pump house, wasn't there?

I These was on by the dam

A. Yes sir.

A. Yes, sir.

. And there was one out in the stream there, where you said it was within fifteen or sixteen feet of where Troglio was drowned, which said "Danger; ten feet deep; keep out."?

A. Yes, sir.

Q. There was another down at the dam where the water came in?

A. Yes, sir.

Q. And then there was another away over on the bank on the other side of the dam?

A. That is all I can remember, is four.

Q. Five?

A. Four.

Q. You do remember four, but you can't remember more?

A. Yes, sir.

RE-DIRECT EXAMINATION.

BY MR. WAGNER:

Q. The boys didn't pay any attention to the signs, did they?

A. ~~Yes~~^{no}, sir.

Q. They went in swimming, anyway?

A. Yes, sir.

MR. SANDERS: That is objected to on the ground that it is leading.

Which objection was by the Court sustained.

To which ruling of the Court in sustaining said objection, plaintiff, by counsel, then and there duly excepted.

Q. The watchman at the pump house never objected to you boys going in swimming?

MR. SANDERS: That is objected to on the ground that it is repetition.

Which objection was by the Court sustained.

To which ruling of the Court in sustaining said objection, plaintiff, by counsel, then and there ~~excepted~~^{duly}.

Witness excused.

ANTONE DONETTI,

A witness for plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. FRANK WALKER:

Q. What is your name?

A. Antone Donetti.

Q. Where do you live?

A. 59 Front street, Meaderville.

Q. You attend school do you?

A. Yes, sir.

Q. Where?

A. Butte Business College.

Q. Did you know John Troglia in his lifetime?

A. Yes, sir.

Q. Did you know him on or about the 13th of June, 1918?

A. Yes, sir.

Q. How old was he at that time?

A. Eleven.

Q. Did you go to the same school with him or not?

A. Yes, sir, at that time.

Q. Were you in the same grade?

A. No, sir; I was in a grade ahead of him, I think.

Q. What grade was he in, do you know?

A. He was passed in the seventh.

Q. And he was then eleven years of age?

A. Yes, sir.

Q. What school was this, Antone?

A. The Franklin school.

Q. That is one of the public schools of the county of Silver Bow, state of Montana?

Q. Yes, sir.

Q. When you say he was past the seventh; what do you mean by that; that he was entering into the eighth grade?

A. No, sir; he was going from the sixth to the seventh.

Q. When was it that he had passed from the sixth grade into the seventh?

A. It was some time in June; I think it was the 13th, that same day that he was drowned.

Q. He had passed his grade that same day?

A. Yes, sir; I am not sure what day.

Q. The 13th day of June was the last day of school for that season?

A. Yes, sir; it was on a Friday, I think.

Q. You were in the grade above him?

A. Yes, sir.

Q. Had you ever been in any of the same classes with him at all?

A. No, sir.

Q. What have you to say, Antone, with reference to whether or not John Troglia was a bright boy or otherwise.

A. Well, he was bright, for he was eleven years, and in the seventh grade.

Q. What have you to say with reference to his physical condition for a boy of eleven years?

A. Well, he was not very tall, but he was strong and husky.

Q. Did you u)ake part in any athletics with him at all?

A. No, sir.

Q. Do you know whether or not he took part in any?

A. Well, he was in the races at the school.

Q. He used to indulge in races at the school?

A. Yes, sir.

Q. Was he or was he not as well proportioned as the average boy of eleven years who attended the Franklin school with him?

A. Yes, sir, and a little bit better.

Q. What have you to say with reference as to whether or not he was as bright as the average boy of eleven years in the county of Silver Bow, state of Montana?

A. Yes, he was as bright as any of them.

Q. Do you know where this artificial pond or dam is located that belongs to the Butte & Superior Mining Company?

A. Yes, sir.

Q. I will ask you whether or not you were around or about those premises on the 13th of June, 1918?

A. Yes, sir, I was there when he drowned.

Q. Did you see John Troglia there?

A. Yes, sir.

Q. Were you there when John Troglia came up on the scene?

A. No sir; he was there before I was.

Q. What was John doing when you came upon the scene?

A. Well, he was playing with a little gun he had.

Q. Was he in the water at the time?

A. No, sir.

Q. Did you see John when he entered the water?

A. Yes, sir.

Q. Were you there when he undressed?

A. Yes, sir; he was undressed when I was there; that is, he had his shirt on, that is all.

Q. Did he remove his shirt before he went in the water?

A. Yes, sir.

Q. Did you see him do that?

A. Yes, sir.

Q. What part of the dam with reference to the directions, north and south and east and west, did he enter?

A. Well, he entered the eastern part of it, the shallow spot.

Q. He entered from the eastern shore?

A. Yes, sir.

Q. Was there any remark made to him by anybody at the time that he entered?

A. No, sir.

Q. I will ask you were you right near him at the time he entered the water?

A. Well, when he went in swimming I was about fifteen feet from him, facing the opposite way.

MR. KREMER: We have a map here.

MR. FRANK WALKER: It is satisfactory to the plaintiff that this map be admitted at this time, if it meets with the approval of the Court.

MR. KREMER: I think it will indicate the conditions very well.

Q. Did you go in the pond that ^{day} yourself?

A. Yes, sir.

Q. At what time with reference to when John Troglia went in?

A. It was about four o'clock; close to four o'clock the last time he went in.

. You say that you were there when John went in?

A. Yes, sir, while I was there.

Q. Was that the first time, or did he go in and come out again?

A. I don't know whether it was the first time but while I was there it was the first time.

Q. That was the only time he went in while you were there?

A. Yes, sir.

Q. What time of the day was that?

A. That was close to four—about half past three, and then he went in again at the last.

Q. What time had school closed that day?

A. Ten-thirty, I think.

Q. In the morning?

A. Yes, sir; it was the last day.

Q. I will ask you at what point John went into the pond with reference to this pump station or pump house referred to in the testimony?

A. Well, it was closer to the pump house where he went in; it was the eastern part, and the pump was southeast from the pond.

Q. Could you say, approximately, how far he was from the pump station when you saw him enter the pond?

A. Oh, just about twenty-five feet where he entered.

Q. Did you see him swim around the pond after he went in?

A. Yes, sir.

Q. I will ask you whether or not there was anything—any fence or any character or kind of abstraction to prevent John Troglia from entering the pond?

A. No, sir.

MR. SANDERS: We desire this line of testimony to go in under the same objection that we made to the former testimony, that it was not the duty of the defendant to provide any fence.

THE COURT: If you want to object to all the evidence, the objection is overruled.

To which ruling of the Court in overruling said objection, defendant, by counsel, then and there duly excepted.

Q. Is there any kind of enclosure about this dam?

A. No, sir; there was only a bank to hold the water, that is all.

Q. That was the only thing that surrounded it of any kind or character?

A. Yes, sir.

Q. Did you see any person, any man connected with the Butte & Superior Company, around or about the premises the day this accident happened?

A. Well, there was the pump man.

Q. Did you see him there that day?

A. Yes, sir.

Q. Did you see him there at the time John Troglia entered the pond or not?

A. Well, he came after he was drowned and tried to get him out.

Q. Did you see him before John drowned?

A. No, sir.

Q. How many times, if at all, had you been at this pond prior to June, 13th, 1918, and during this season?

A. Twice, I think; it was after school.

Q. When was it with reference to this day?

A. Well, between the first and the thirteenth.

Q. You were there twice before June 13th?

A. Yes, sir.

Q. Or was it twice including June 13th?

A. No, this was the third time.

Q. On the other two occasions had you seen any boys in the water there?

A. Well, there was two boys with me; we just went there to take a bath, about ten or fifteen minutes.

Q. Did you see the pump man there on either of those occasions?

A. No, sir.

Q. Did you ever see the pump man there at any time when you went in the pond or enclosure?

A. Only the day of the drowning.

Q. Were you up around the pond at any time other than these two times that you testified that you went into the dam?

A. Well, I just passed there on a bicycle; I never stopped there.

Q. During the month of June?

A. Yes, sir.

Q. Did you see any boys in there as you passed?

A. No, sir; this was about five o'clock in the evening.

Q. And there was nobody there?

A. No, sir.

Q. Do you know where this highway is, the public highway near the pond and west or northwest of the pond?

A. No, it is west; northwest; it is right near the house, Folger's house.

Q. Have you ever seen any person or persons use that road during the month of June, 1918?

A. Yes, sir.

Q. I will ask you whether there were many persons or few who used that road?

A. It was just an automobile that I saw, and a few grocery wagons.

Q. I will ask you if there any house in the immediate vicinity of this highway?

A. Yes, sir; there is six or seven houses.

Q. Where were you at the time that John Troglia sank?

A. Well, I was right on the embankment, facing the opposite way.

Q. Did you see him at any time immediately prior to his drowning?

A. Well, I saw him—I went after one boy, I and another boy, and when I got out I seen him just go down; that is all I saw.

THE COURT: I don't imagine there is any dispute about this drowning having occurred?

MR. WALKER: I take it, your Honor, that the map is introduced in evidence.

THE COURT: Yes.

Q. Will you take your pencil and mark the point about where John Troglio was situated at the time that he was drowned in the pond.

A. It was about ^{out} ~~out~~ up here.

Q. Put an A there.

(Witness marks the letter A on the map).

Q. Do you know how deep the water of the pond was at about that place?

A. Well, close to eight feet, I guess, or more.

Q. Do you know how tall John Troglio was on the 13th of June, 1918?

A. About four feet, six.

Q. About how many boys were in swimming in this pond on the 13th of June, 1918?

A. Oh, about twelve or fourteen.

Q. I will ask you whether or not the boys were quiet or whether or not they were making any noise, shouting or playing or calling?

A. Well, they were not making much noise; those in the water, they would holler once in a while, playing around.

Q. I will ask you whether or not they hollered to each other?

A. No, sir.

Q. Did you hear any calling of one boy to another or any laughter or anything?

A. No, sir.

Q. You went there on three occasions during the month of June, 1918, you say?

A. Yes, sir.

Q. Did anybody on any of those occasions forbid you from going on the premises?

A. No, sir.

CROSS EXAMINATION.

BY MR. KREMER:

Q. You say that John Troglia went in twenty-five feet from the pump house?

A. Yes, sir.

Q. How deep was the water there?

A. Well, about eight feet, I guess.

Q. What did he do, dive in?

A. No; he just walked out till it got deeper than he swam out.

Q. He was a good swimmer, was he?

A. Yes, sir, for his size he was a good swimmer.

Q. And you had been swimming with him twice before that?

A. Not with him; it was the first time I was with him.

Q. Wasn't he there when you were there?

A. No, sir.

Q. You went there, then, with the Bertoglio boy who just left the stand?

A. No; I was there the day he drowned, but not the other times.

Q. I meant upon the other occasions?

A. No, sir.

Q. You say he was drowned right where this mark of "A" is made or just about there?

A. Yes, sir.

Q. Now, isn't that just about exactly the place where that sign is that reads: "Danger, keep out; ten feet deep"?

A. No, the sign is on the opposite side of the gate.

Q. Isn't that sign right there?

A. No, sir; there is no sign in the water; the sign is on the embankment.

Q. Sure of that?

A. Yes, sir; the sign is away outside of the water on each side of it, but not in the water.

Q. How many signs do you remember there?

A. Four or five.

Q. Can you tell us where they are?

A. Well, there is one: "No trespassing," right on the dam there.

Q. Here?

A. Yes, sir.

Q. And this other one right close to the gate there?

A. Right about here.

Q. Then there is two: "Ten feet deep," on each side, and down here do you remember one down here?

A. Yes, I believe there was one on the upper side there.

Q. In fact, there were signs all around you?

A. There are four or five, I am sure.

Q. And it would be impossible for a boy to go up there and go in swimming in that pond without seeing those signs, wouldn't it?

A. Well, I don't know; they could see them, all right, because they ought to see one of them.

Q. And you are sure that John Troglia saw the sign, are you?

A. Well, I don't know if he saw it or not. He never said anything about it, but he was supposed to see it; he passed there.

Q. He went in right there by the sign, didn't he?

A. Yes; I don't think he paid any attention to them.

Q. You don't think he paid any attention to the signs?

A. None of the boys did.

Q. They knew they were there?

A. Yes, sir.

Q. You knew they were there?

A. Yes, sir.

Q. You paid no attention to them?

A. Oh, well, I read them once in a while.

Q. You know that John Troglia could read, don't you?

A. Yes, sir.

Q. He was a bright boy, you say?

A. Yes, sir.

Q. How long had you been there before he was drowned?

A. You mean that same day?

Q. Yes.

A. I came there about two-thirty.

Q. And he was drowned about what time?

A. About four.

Q. Had he been going in and out of the water?

A. Yes; he would go in for ten minutes at a time, or fifteen and then come out.

Q. He had been swimming there for a couple of hours?

A. Yes, sir.

Q. Did you tell me whether he was a good swimmer or not; you said he was good for his size?

A. Yes, sir.

Q. Did he dive into the deep water?

A. No, sir; he would just go out where it is shallow and swim out to the deep, and then swim back again.

Q. You saw him swimming there in the deep water, and you did not see any difficulty in his swimming, did you?

A. No, sir.

Q. He was considered as good a swimmer as the rest of the boys, wasn't he? *He was as good a swimmer as any was, is he? former*

A. Not quite, but he was a good swimmer.

WITNESS EXCUSED.

HUGO GIACHETTI, a witness for plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. WALKER:

Q. What is your name?

A. Hugo Giachetti.

Q. Where do you live?

A. 65 Atlantic street.

Q. You are attending school, are you?

A. Yes, sir.

Q. How old are you?

A. Fourteen.

Q. I will ask you if you knew John Troglia in his lifetime?

A. Yes, sir.

Q. You knew him on the 13th of June, 1918?

A. Yes, sir.

Q. Were you attending school with him that time or not?

A. Yes, sir.

Q. Did you attend the same school?

A. Yes, sir.

Q. Were you in the same grade?

A. Yes, sir.

Q. I will ask you whether or not you were around and about the pond, the artificial pond, that is maintained by the Butte & Superior north of Meaderville on the 13th of June, 1918?

A. I was there that day, but I was not there when he was drowned.

A. Had you been there prior to the 13th of June?

A. Yes, sir.

Q. How often prior to that?

A. Oh, once that day.

Q. How often prior to the 13th of June; how many times before that?

A. Two times.

Q. When was that?

A. That was on Saturday, and on Sunday, you know, we would go out and go swimming.

Q. And during the month of June you had been there twice before the 13th of June?

A. Yes, sir.

Q. Did you go in the water?

A. Yes, sir.

Q. Do you know where this pump station is near the pond?

A. Yes, sir.

Q. Do you know who maintains that?

A. The pump man.

MR. KREMER: The Butte & Superior maintains that pump station.

Q. Did you see the pumpman there at any time while you were in the water?

A. Yes, sir; he used to go in the pump room to go to work.

Q. Did you go into the pump room during the month of June, 1918, to get warm?

A. Yes, sir, on Sundays we used to go in and get warm, and also to see the funny papers.

Q. Can you say what the pump man was doing at those times?

A. He was attending to the engine, to the pumps.

Q. At the time that you went into the pump room were you dressed; did you have your clothes on or were you naked?

A. Naked.

Q. I will ask you whether or not you saw the pumpman at any time when you were in the water?

A. No, sir.

Q. Did you go immediately from the water to the pump room at any time during the month of June?

A. Yes, sir, on Sundays we used to go to see the funny pictures, and tried to get ahead of each other.

Q. How many of you were there that went in on the last occasion that you went into the pump room?

A. I don't know.

Q. The last time you went in there was prior to the 13th of June, 1918, wasn't it?

A. No, sir; it was the Sunday before.

Q. Do you know how many boys went into the pump room with you that day?

A. I don't know, sir.

Q. Were there more than one?

A. Yes, there was more than one; there was one looking at the funny pictures, and about two or three standing around to get next.

Q. What do you mean by getting next.

A. Next with the funny pictures.

Q. You mean taking your turns glancing at the papers?

A. Yes, sir.

Q. I will ask you whether or not, when you went into the pump room, immediately prior to June 13th, your body was wet or dry?

A. Wet.

Q. I will ask you what was the condition, if you

noticed of the bodies of the other boys with reference to being wet or dry?

A. The two that came in with me were wet, and the one that was looking at the funny pictures was dry.

Q. Did you have any conversation or did you hear any of the boys have a conversation with the pump man with reference to going from the pond or with reference to what you were doing or anything of that kind or character?

A. No, sir.

Q. Did the pumpman see you as you first came into the pump room?

A. Yes, sir.

Q. Did you boy speak to him at all?

A. Not while we were waiting for the funny pictures.

Q. Did you talk to him when you first came into the pump room?

A. No, sir.

Q. Did you say hello to him?

A. Oh, we said hello to him when he was through phoning. They phoned from the Superior down there to the pump room, and he came out and he said hello to these boys, and we answered him back and said hello.

Q. Where were you at that time?

A. We were just right in the door, and he got through phoning and he said hello, and we said hello, and that is all I said.

Q. That was immediately after you came from the pond?

A. Yes, sir.

Q. What have you to say with reference as to whether or not there was any barrier or fence at any point around or about this pond or artificial lake?

A. No, sir.

Q. Was there anything to hinder or keep a boy or anybody else from walking from the vicinity there right into the pond?

A. No, sir.

Q. Do you know where the public highway is located with reference to this pond?

A. Yes, sir.

Q. How far would you say it was located from the western or northern border of the pond?

A. Twenty-five to thirty feet.

Q. Did you see any person or persons using that road during the month of June, 1918?

A. Yes, sir.

Q. About how many people would you say that you saw using it?

A. Oh, there was a ranchman up there, and he used to always come down to Meaderville, and there was the boss that would be from the Bacorn with the automobile, he always used to come down there, too.

Q. In order to travel from Meaderville to the Butte & Bacorn mine I will ask you whether or not one had to use this highway?

A. Yes, sir.

Q. Did this serve as a highway to any other property except the Butte & Bacorn?

A. And the Butte & Great Falls.

Q. The Butte & Great Falls was away north and beyond the pond, was it?

A. Yes, sir.

Q. And did those persons travelling to the Butte & Great Falls use this highway as a means of traversing to that place?

A. Yes, sir.

Q. There are some houses, are there not, located in this immediate vicinity?

A. Yes, sir.

Q. Did you see John Troglio in the water on the 13th of June, 1918?

A. Yes, sir.

Q. Where were you when you last saw him?

A. I was on the bank.

Q. Had you been in the water this day yourself?

A. No, sir.

Q. Did you see John Troglio when he went into the water?

A. No, sir.

Q. You didn't observe that?

A. No, sir.

Q. Was there more than one watchman or pumpman at the same time at or about this pond during the month of June?

A. No, sir; there was just the pumpman.

Q. Did you ever see this pumpman or hear him converse with any of the boys at or near the pond during the month of June?

A. No, sir.

CROSS EXAMINATION.

BY MR. KREMER:

Q. This road leading up to the Great Falls and Bacorn was not traveled very much, was it; there was nobody working at the Great Falls in 1918, was there?

A. No, sir.

Q. And the only people at the Butte & Bacorn that used the road was the superintendent with the machine; the men went up on the track, didn't they?

A. Yes, sir.

Q. And that is about all it was used for, wasn't it?

A. Yes, sir.

Q. Do you remember the signs around that pond?

A. Yes, sir.

Q. How many do you remember?

A. Four or five.

Q. Will you tell the jury what was on those signs?

A. There was one: "No trespassing," and there was four: "Ten feet deep, keep off."

Q. Four of them?

A. Yes, sir.

Q. And you paid no attention to the signs?

A. No, sir.

Q. Was Troglia a good swimmer?

A. A good swimmer for his size.

Q. And he was pretty athletic, wasn't he, well developed?

A. Yes, sir.

Q. He was considered one of your strong boys in school, a good athlete?

A. Yes, sir.

Q. You were in the same room with him, so you heard him read?

A. Yes, sir.

Q. You know he could read?

A. Yes, sir.

Q. He was a bright boy?

A. Yes, sir.

Q. Do you know whether he saw these signs or not?

A. I don't know.

Q. Do you think it would be possible for a boy to go in swimming up there without seeing these signs?

A. No, sir.

Q. He was bound to see them?

A. Yes, sir.

Q. Now, on this Sunday when you were out there swimming, that was the Sunday before the 13th of June?

A. Yes, sir.

Q. What time was it when you went in that pond?

A. Two o'clock.

Q. Who was the man that was there?

A. I don't know.

Q. What kind of a looking man was he?

A. Skinny, and like an old man.

Q. Did he have a mustache?

A. No, sir.

Q. A smooth face?

A. Yes, sir.

Q. A thin man?

A. Yes, sir.

Q. Do you know what they called him, his first name or any other name?

A. No, sir.

Q. Can you give us any other description than just a smooth faced, thin man; was he tall?

A. He was tall looking.

Q. Was he old or young?

A. Old.

Q. About how old?

A. About around the age of forty-five or forty-six.

Q. You went in there with the other boys; was Troglia with you?

A. No, sir.

Q. He was not there at all that Sunday?

A. No, sir.

Q. You never saw him in the pump house?

A. No, sir.

Q. And you had gone up there the day that he was there swimming and drowned, and then you went away?

A. I was not there at the moment he got drowned; I left about ten or fifteen minutes before he got drowned.

Q. And you saw him swimming out in the deep water?

A. No, sir.

Q. Where was he swimming when you were there, or was he swimming at all when you were there?

A. No, sir.

Q. He was out on the bank?

A. Yes, sir; he and I were playing with this cap gun that he had.

Q. But you had seen him swimming in the deep water before that?

A. No, sir.

Q. How did you know he could swim?

A. Well, the boys all told us that he could swim, and he used to run races and everything.

Q. In the water?

A. Yes, and see how long he could stay under the water.

Q. He would see how long he could stay under the water?

A. Yes, sir.

Q. He was a fancy swimmer; by that I mean a swimmer that could do more than just go through the water?

A. Yes, sir.

Q. Did you ever see him make any high dives?

A. No, sir; he never used to dive.

Q. Do you know whether he was trying to stay under the water this day that you were there?

A. No, sir.

Q. Now, how many houses are there?

A. Six or seven.

Q. Look at that map, and see if there are any other houses that are not shown on that map. There is the McLeod house right down here, isn't it?

A. Yes, sir.

Q. You know the McLeod house?

A. Yes, sir.

Q. And here is your pump station?

A. Yes, sir.

Q. Who lives here, do you know?

A. No, sir.

Q. Is that where the Allens live?

A. The Holters live down here, and the Allens live up there.

Q. That is all the houses about there; those three houses are the only ones that really are very close to the pond?

A. Yes, sir.

Q. Now, you went up there on those two occasions before the time that this Troglia boy was drowned?

A. Yes, sir.

Q. Who did you go with?

A. Myself and the boys that were up here before I was.

Q. Did I ask you whether Troglia was with you upon either one of those trips?

A. Yes sir. He was not with us either one of those trips.

RE-DIRECT EXAMINATION.

BY MR. ^{FRANK} WALKER:

Q. I will ask you did you see the watchman during any time of the year 1918 and prior to June 13th, talk to any of the boys as some of them were inswimming, and while he was at and near the pond?

A. No, sir.

Q. For the purpose of refreshing your memory I will ask you if the watchman of the Butte & Superior, or the pumpman, did not ask you why it was that he did not go in swimming?

A. Yes, sir.

MR. SANDERS: That is objected to on the ground that it is leading.

THE COURT: I think it is proper under the circumstances. The objection will be overruled.

To which ruling of the court in overruling said objection, defendant, by counsel, then and there duly excepted.

THE COURT: It is to direct his memory to the particular point. It is not very material otherwise.

A. Yes.

RE-CROSS EXAMINATION.

BY MR. KREMER:

Q. Was that the same watchman or pumpman?

A. Yes, sir.

Q. Was that that Sunday?

A. Yes, sir; he was with me that Sunday.

Q. It was the same Sunday that he spoke to your brother?

A. Yes, sir.

Q. It all happened that day?

A. Yes, sir.

Q. At the same time?

A. Yes, sir.

WITNESS EXCUSED.

THOMAS CIABATTARI, a witness for plaintiff,
after being duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. FRANK WALKER:

Q. Your name?

A. Thomas Ciabattari.

Q. How old are you?

A. Fourteen years old.

Q. Where do you live?

A. Meaderville.

Q. Do you go to school now?

A. Yes, sir.

Q. Did you know John Troglia in his lifetime?

A. Yes, sir.

Q. Did you know him on the 13th of June, 1918?

A. Yes, sir.

Q. Did you see him that day?

A. Yes, sir.

Q. I will ask you whether or not you have ever gone swimming in the pond known as the Butte & Superior pond north of Meaderville?

A. I did go swimming there.

Q. How many times did you go swimming there during the year 1918?

A. About two times.

Q. Was that before the 13th of June, 1918?

A. No.

Q. Do you remember the day that John was drowned?

A. Yes, sir.

Q. Was it before that time that you went in swimming there?

A. No, sir; it was after—I don't know what you mean.

Q. Was it afterwards that you went in?

A. Before he got drowned.

Q. Before he was drowned?

A. Yes, sir.

Q. How many boys went in with you?

A. I don't remember.

Q. Well, about how many; were there two or three or four or more?

A. About four or five.

Q. How many days before the 13th of June, before the day that John was drowned was it that you first went in during the season of 1918?

A. About once.

Q. What date was it, do you remember?

A. No, sir.

Q. Was it before or after the first of June?

A. Around the sixth of June I went.

Q. About a week before the 13th?

A. Yes, sir; and then I went the day he got drowned, but I came home about ten minutes before he got drowned.

Q. Did you know the pumpman that was in charge of the pump up there near the pond?

A. No, sir.

Q. Did you ever see him?

A. No, sir.

Q. Was John Troglia there with you the 7th of June?

A. Yes, sir—the 13th of June, you mean.

Q. The time before, was he there?

A. No, sir; I never seen him.

Q. Did you see him go into the water on the 13th of June?

A. No, sir.

Q. The day that he was drowned?

A. No, sir.

Q. Did you see him around there?

A. Yes, sir, he had a cap gun and we were playing with it.

Q. Was he dressed or undressed at that time?

A. He was undressed.

Q. How many boys were in the water when you left the pond?

A. About seven or eight.

Q. Did you know any of those boys?

A. Yes, sir.

Q. Some of them are the boys that have been on the witness stand?

A. Yes, sir.

Q. Did anybody connected with the Butte & Superior Mining Company, any pumpman or any watchman tell you not to go in the water that day?

A. No, sir.

Q. Did anybody tell you not to go into the water on the 7th or ^{the} 6th of June, the time you went in before?

A. No, sir.

Q. I will ask you whether or not there was any fence or barrier to prevent you from going into the water?

A. No, sir; there was no fence there or nothing.

Q. Was there anything to prevent you from going into the water?

A. No, sir.

Q. Do you know where this road or highway is north and west of the Butte & Superior pond?

A. I think it is on the west of it.

Q. The road?

A. Yes, sir.

Q. Where does that road lead to, do you know?

A. The Butte & Superior mine, I think.

Q. Is that the same road that leads to the Butte & Bacorn?

A. Yes, the Butte & Bacorn; the same road goes right up to the Butte & Bacorn mine.

Q. This road that is north of the pond, where does that road lead to?

A. To the Butte & Superior mine.

Q. This road that is north of the pond, where does that road lead to?

A. To the Butte & Superior mine.

Q. You are sure of that?

A. Yes, sir.

MR. KREMER: He is right about that.

Q. And it also goes to the Butte & Bacorn?

A. Yes, sir—I mean it goes to the Butte & Bacorn mine.

Q. Does it go to the Butte & Superior?

A. I don't know. I meant to say it goes to the Butte & Bacorn.

Q. Did you ever see anybody on that road?

A. No, sir. There are some houses up there.

Q. Did you ever see anybody walking or driving on that road?

A. Yes, sir.

Q. How many people?

A. There was automobiles going up that road.

Q. Just automobiles, is that all?

A. And up on the side of the road there was roads leading off—away up around the houses.

Q. You left before John Troglia was drowned?

A. Yes, sir.

CROSS EXAMINATION.

BY MR. KREMER:

Q. The road to the Butte & Superior is the one that leads north; the Butte & Superior is far closer to town than the pond?

A. Yes, sir.

Q. You don't have to pass the pond to go to the Butte & Superior?

A. No, sir.

THE COURT: He corrected that and said he meant the Butte & Bacorn.

Q. Now, upon these two times that you went there before the 13th of June, who was with you?

A. Me and my brother Antone Ciabattari.

Q. Troglia wasn't with you?

A. No, sir.

Q. Just three of you in there swimming?

A. Yes, sir.

Q. You saw signs there, didn't you?

A. Yes, sir.

Q. You saw the signs there the day that the Troglia boy was drowned, didn't you?

A. Yes, sir.

Q. And what did the signs say?

A. "No trespassing" and "Danger, ten feet deep."

Q. How many of them, do you remember?

A. About four.

Q. And you paid no attention to the signs?

A. No, sir; I didn't understand the signs.

Q. You could read it where it said danger, ten feet deep and you couldn't understand it?

A. No, sir; I didn't even look at that.

Q. How do you know they were there?

A. That is what the boys would say.

Q. The boys said that they were there?

A. Yes, sir; well, I seen them, but I never used to read them.

RE-DIRECT EXAMINATION.

BY MR. FRANK WALKER:

Q. You didn't go into the water there on June 13th?

A. Yes, I went in about once or twice.

Q. Did you stay in very long?

A. About five or ten minutes.

Q. Why was it you came out then?

A. I came out.

Q. You came out right after you were in five or ten minutes?

A. Yes, sir.

Q. What was your reason for that?

A. I wanted to go and play.

Q. I will ask you whether or not this water was warm or cold?

A. It was kind of warm.

WITNESS EXCUSED.

Adjourned until Saturday morning at 9:30 A. M.

Saturday, Nov. 22nd, 1919, 9:30 A. M.

JOSEPH DARIN, a witness for plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. FRANK WALKER:

Q. State your name.

A. Joseph Darin.

Q. What is your age?

A. Thirteen.

Q. Where do you live?

A. 69 Main street, Meaderville.

Q. Did you know young John Troglia in his lifetime?

A. Yes, sir.

Q. Do you know the artificial pond or reservoir as it is called here, which is located north or north-east of Meaderville?

A. Yes, sir.

Q. Did you ever go swimming in that pond prior to the 13th of June, 1918?

A. Yes, sir.

Q. How many times?

A. Once before that.

Q. When was that?

A. On the Sunday.

Q. The Sunday prior to the 13th of June?

A. Yes, sir.

Q. Is that the only other time that you had been in there?

A. Before he was drowned.

Q. Were you in there the year prior?

A. Yes, sir.

Q. How many times were you in there swimming the year prior?

MR. KREMER: That is objected to as incompetent. The condition is shown to have been changed entirely from the year before.

THE COURT: He may answer. I doubt if it is immaterial, but it may show that it is a place of common resort. Objection overruled.

To which ruling of the court in overruling said objection, defendant, by counsel, then and there duly excepted.

Q. Were you there during the year 1917?

A. Yes, sir; the year 1918.

Q. Were you there during the year 1917, the year prior to the year that John Troglia was drowned?

A. Yes, sir.

Q. How many times were you there during the year 1917?

A. Sometimes I would go there two times a day.

Q. Beginning what month in the year 1917?

A. I don't know.

Q. Were you there before school closed?

A. Yes, sir, in the night; many times I went there before the school closed.

Q. In 1917?

A. Yes, sir.

Q. And the school closed in the month of June, 1917, did it not?

A. Yes, sir.

Q. Were you there during the months of July and August or during the months of vacation?

A. During the months of vacation I was there.

Q. Was there any watchman or pumpman in the vicinity?

A. There was a pumpman in the pump station there.

Q. Did the watchman or the pumpman object to you boys going in swimming?

MR. KREMER: All this ^{is} in 1917?

MR. WALKER: Yes.

MR. KREMER: We renew the objection as to what might or might not have been said or done by the pumpman or watchman in 1917, on the ground that it ^{not} was the dam or pond referred to ⁱⁿ the complaint.

THE COURT: I think he may answer. Objection overruled.

To which ruling of the Court in overruling said objection, defendant, by counsel, then and there duly excepted.

A. Yes, sir. He did not tell us anything.

Q. Was the watchman about the premises at any time when you boys were in swimming?

A. Yes, sir.

Q. Did he see you while you were in swimming.

A. He did see us in there many times.

Q. What was the condition of this pond or dam, Joseph, in 1917 as compared with 1918; was there any material difference in the pond?

A. No, sir. They had made a new bank there to hold back the water.

Q. About how deep was the water in the immediate vicinity of the dam in 1917?

A. Oh, about six or seven feet?

Q. Was it the same in 1918 or different?

A. Different; it was deeper in 1918.

Q. Were there other boys with you when you were in swimming in 1917?

A. Yes, sir.

Q. About how many?

A. Oh, about six or seven.

Q. Did you boys play in the water when you were in the water?

A. Yes, sir.

Q. Did you call or shout at each other in playing your games?

A. We hollered to each other many times.

Q. Now, there is a road or highway near this point, is there not?

A. Yes, sir.

Q. And about how far from the western or northern border of the pond is this road?

Other place it is right up to the bank, a few yards

A. Well, one place it is about fifteen feet, and the away from it.

Q. Is that road used by the people or is it used by automobiles or wagons?

A. Well, it is used by some automobiles, and the ranchers there, and there is a few houses there, and sometimes people walk on that road.

Q. To what point does that road lead?

A. To the Butte & Bacorn, up to the junction.

Q. Have you seen people passing over that road during 1917 and 1918?

A. I have seen some automobiles passing and wagons.

Q. Did you ever see any people walking on the road?

A. The ones that live in the houses.

Q. Now, during the year 1917 was there any fence or barrier around or about the borders or edge of this road?

A. No, sir.

Q. During the year 1918, Joseph, was there any fence or barrier or anything that would impede or stop one from going into the water?

A. No, sir.

Q. You were in the pond on the Sunday prior to June 13th, you say?

A. Yes, sir.

Q. Were you at any time during the year 1918 in the pump room?

A. Yes, sir.

Q. When and on what day?

A. Well, I cant tell you the date, but I was in there many times.

Q. Prior to June 13th the day John was drowned?

A. I wasn't in tha fday.

Q. Was it before that?

A. Yes, sir; that Sunday, I went in then.

Q. And when you went into the pump room were you dressed in your clothes, your suit and stockings and shoes, or were you naked?

A. I was dressed that time. I didn't go in that day.

Q. Was there any boys up there with you that day?

A. Yes, sir.

Q. No see they also in the pump room, yes sir.

Q. How were they dressed?

A. They were dressed; there was only two of them there naked looking at the funny pictures.

Q. Who were those boys that were naked?

A. Well, I don't remember who they were.

Q. Did you see those boys go into the pump room?

A. Yes, sir.

Q. Were their bodies dry or wet?

A. Well, their bodies were dry, because they were in there looking at the paper. This man came in, and their bodies were dry then.

Q. Did you notice them as they came into the pump room, Joseph?

A. Yes, sir.

Q. What was the condition of their bodies then as to being dry or wet?

A. Well, they was wet when they came in; they just came out.

Q. Where was the pump man when they came in?

A. He was up back there; he seen us coming in. He was there, sitting down, reading the paper.

Q. Was he talking to any of you boys immediately after you came in or not?

A. He said hello, ^{to us} that is all.

Q. That was the only conversation that you had with the pump man?

A. Yes, sir.

Q. Were you there at this pond or dam on the 13th of June?

A. I was there, yes, sir, just before he got drowned.

Q. Were you there at the time that John Troglia ~~went away.~~ *was drowned*

A. No; he was just going in the water when I ~~was drowned?~~ *went away*

Q. Do you know where the pump man was at the time that John Troglia went in the water?

A. When he went into the water the pump man was in the station there.

Q. Were you present at the time that John went into the pond?

A. Yes, sir.

A. How many boys were around and about the pond at that time?

A. Oh, there was about thirteen or fourteen boys.

Q. I will ask you what the boys were doing?

A. Well, there was some just come out of the water, and some going in and some going home with me.

Q. Were they playing any games in the water?

A. Well, just swimming around, that is all.

Q. Were they shouting and calling to each other?

A. They would shout, sure.

Q. And from the place that these boys were play-

ing swimming how far is it to the pump house?

A. About seven or eight yards.

Q. Do you know whether or not the doors or the windows of the pump house were open or closed on the 13th of June?

A. Well, I know the door was open when I went by there.

Q. You were sure of that?

A. Yes, sir.

Q. You say there were several boys in the water this day?

A. Yes, sir.

CROSS EXAMINATION.

BY MR. KREMER:

Q. Did you see those signs up there?

A. Yes, sir.

Q. What was on the signs?

A. One says: "No trespassing," and there was three other, "Ten feet dep, keep away."

Q. Ten feet deep, keep out, danger?

A. There was a danger sign, yes, sir.

Q. Where were these signs?

A. There was one right there on the bank which said "No trespassing," and there were the other ones around the bank: "Ten feet deep, keep away."

Q. Where were the rest of them?

A. There was three of them around the dam, "Ten feet deep, keep away," and there was only one there that did not say ten feet, and it said: "No trespassing."

Q. Do you know what that meant?

A. Yes, sir.

Q. What did it mean?

A. Not to walk around there.

Q. So the signs ten feet deep, keep out meant that you must not walk around the pond?

A. The signs ten feet deep, keep out; danger, meant to keep away from there.

Q. Danger of what?

. "Danger, ten feet deep, keep away."

Q. Keep out out of the pond; you knew what ~~it~~ *that* meant, didn't you?

A. Yes, sir.

Q. Did you keep out?

Q. No, sir.

Q. John Troglio was there with you on this Sunday, was he?

A. No, sir.

Q. But you went up there with him on the day that he was drowned?

A. I was not with him; he was just going in. He was there undressing to go in when I was coming home.

Q. Did you ever see him up there before?

A. Yes, sir.

Q. How many times during the year 1918?

A. Twice.

Q. Was he a good swimmer?

A. For his size he was.

Q. Was he as good a swimmer as you are?

A. Yes, better.

Q. Can you swim?

A. No, sir, not very good.

Q. And was he a strong, healthy, robust boy?

A. Healthy and strong for his size.

Q. How big was he?

A. Well, he is as big as I am.

Q. He was as big as you are now?

A. Yes, sir.

Q. Was he a bright boy?

A. Yes, sir.

Q. Did you go to the same school with him him?

A. Yes, sir.

Q. Were you in the same room?

A. No, sir.

Q. Was he behind you or ahead of you?

A. Two grades ahead of me.

Q. How old was he?

A. Eleven years old.

Q. And you are now thirteen?

A. Yes, sir.

Q. You were really older than he was?

A. Yes, sir.

Q. And he was two grades ahead of you?

A. Yes, sir.

Q. You know he could read, dont you?

A. Yes, sir.

Q. It would be impossible for a boy to go up there to go in swimming in that pond without seeing these signs, wouldn't it?

A. No, sir.

Q. He was bound to see the signs?

A. Yes, sir.

Q. Now, about this Sunday that you were there in the pump house, what kind of looking man was this pump man that you saw?

A. Well, I don't quite remember how he looked. He was a big, tall man, big and skinny.

2 was he young or old
A. Kind of old and kind of skinny.

Q. Skinny and old. What do you mean by old; can you tell us about how old. Did he have gray hair?

A. No, sir.

Q. Smooth face?

A. Yes, sir.

Q. Don't you know that the pump man that was on at two o'clock on the Sunday preceding the 13th of June was a man with a gray mustache?

A. I don't quite remember if it was him, if he had a gray mustache.

Q. Would you know his name if you heard it?

A. No, sir.

Q. Now, you spoke of the summer of 1917. In the spring of 1918 before the warm weather came isn't it a fact that they put in this dam that is shown there in the yellow on that map behind you?

A. Yes, sir.

Q. That dam deepened the water?

A. Yes, sir.

Q. This water in 1917 was only about three feet deep in that pond, was it not?

A. About five feet.

Q. No deeper than that?

A. Five or six feet.

Q. You have no means of knowing, except just simply swimming in the water just how deep it was?

A. Well, it was almost over my head at that time.

A. Well, you are not a very good swimmer?

A. No, sir.

Q. You didn't go in that deep water, did you?

A. No, sir.

Q. So you don't know how deep it is or was out there?

A. No, but I heard it was ten feet; I didn't go out there.

Q. I mean in 1917?

A. Oh, I was out there then, yes, sure.

Q. You did go out there?

A. Yes, sir.

Q. Even though you couldn't swim?

A. Yes, sir.

Q. Then, it was not over you head?

A. Almost over my head.

Q. Almost but not quite over your head?

A. No, sir.

RE-DIRECT EXAMINATION.

BY MR. FRANK WALKER:

Q. During the year 1917, Joseph, was there any place in that pond where the water was over your head?

A. Well, not quite; it was about up to my neck at that place there by the gate.

Q. Was there any place in the pond where the water was ~~was~~ over your head?

A. No, sir.

Q. You said on direct examination that the water was six or seven feet; what did you mean by that, Joseph?

A. Well, it was not quite that deep.

Witness excused.

NICHOLAS FABATZ,

A witness for plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. FRANK WALKER:

Q. State your name.

A. Nicholas Fabatz.

Q. How old are you?

A. Thirteen.

Q. Where do you live?

A. 23 Lincoln avenue.

Q. You go to school, do you?

A. Yes, sir.

Q. Did you know John Troglio in his lifetime, the *little* boy who was drowned?

A. No, sir.

Q. You didn't know him?

A. No, sir.

Q. Do you know this pond or dam owned by the Butte & Superior located north of Meaderville?

A. Yes, sir.

Q. Were you ever there the year before the year in which John Troglia was drowned?

A. Yes, sir.

Q. Were you there the year before the year that John was drowned?

A. Yes, sir.

Q. What year was John drowned in?

A. 1918.

Q. You were there around this pond in 1917?

A. Yes, sir.

Q. How many times?

MR. KREMER: We object to any testimony with reference to conditions of the pond in 1917, it being clearly shown that the conditions were entirely changed between 1917 and 1918.

THE COURT: Yes, but I think he can answer. It shows it a common resort and whether or not notice could be inferred from it, or whatever it is very material we will see when the testimony is all in. Objection overruled.

To which ruling of the Court in overruling said objection, defendant, by counsel, then and there duly excepted.

MR. KREMER: It may all go in under the same objection?

THE COURT: Yes.

A. About five or six times.

Q: Were there other boys with you at those times?

A. Yes, sir.

Q. How many boys, about?

A. About seven or eight.

Q. Did you go into the pond?

A. Yes, sir.

Q. Did the other boys go into the pond?

A. Yes, sir.

Q. Did you ever know John Troglio to see him?

A. No, sir.

Q. When you saw him you didn't know who John Troglio was at all?

A. No, sir.

Q. Did you know the pump man or the watchman that was working for the Butte & Superior, located

A. No, sir.
around the pond?

Q. Did you ever see him?

A. Yes, sir.

Q. Were you ever in the pump house during the year 1917?

A. No, sir.

Q. Did the pump man or watchman ever come to see you go into this pond?

A. In 1918 he did.

Q. Did he in 1917?

A. No, sir.

Q. When you boys went into the pond in 1917 did you play games in the water?

A. Yes, sir.

Q. Chase each other around?

A. Yes, sir.

Q. And shout or call out to each other?

A. We were not shouting, but we were talking.

Q. And the pump house was about how far from you when you were doing this talking?

A. About twenty-five feet.

Q. Did anybody interfere or prevent you from going into the water?

A. No, sir.

Q. Now, in the year 1917 was this pond or artificial lake any different than it was the year 1918?

A. Yes, sir.

Q. What was the difference?

A. It was deeper and bigger.

Q. In 1918 than it was in 1917?

A. Yes, sir.

Q. I will ask you how deep the water was in the year 1917 in that pond?

A. Four or five feet deep.

Q. Was there any place in the pond where the water was over your head?

A. No, sir.

Q. Did you walk all through the pond?

A. Yes, sir.

Q. And there was no place where it was over your head?

A. No, sir.

Q. Was there any barrier or fence around this place in 1917?

A. In -17?

Q. Was there any barrier or fence or anything to prevent from none going from the ground or the borders of the pond into the water in 1918?

A. No, sir.

Q. How man times, if at all, were you around this pond or in it 1918?

A. That was my first time that year.

Q. Had you been up around there before that at all?

A. No, sir.

Q. You say you saw the watchman in there in 1918?

A. That is the first time I saw him there was when John Troglio was drowned.

Q. Was it before or after John Troglio was drowned that you saw the watchman?

A. Before.

Q. How long before, Nicholas?

A. About an hour before.

Q. Where was he then?

A. Who?

Q. The watchman?

A. He was over there watching us swimming.

Q. He was watching you swimming?

A. Yes, sir.

Q. How many boys were in swimming about that time?

A. They was about four or five.

Q. Did the watchman say anything to the boys who were in swimming?

A. No, sir.

Q. Were you in swimming at the time?

A. Yes, sir.

Q. Who was there when you went in swimming?

A. There was one boy over there, Joe Bertoglio.

Q. Was the watchman there when you went in swimming?

A. Yes, sir.

Q. Did he tell you not to go in?

A. No, sir.

Q. After you were in did he tell you to come out?

A. No, sir.

Q. Did you see John Troglia around there this day?

A. Yes, sir.

Q. You saw John?

A. Yes, sir.

Q. How long prior to his death was it that you first saw him.

A. About two or three hours before.

Q. What was he doing around there?

A. He was playing with his gun.

Q. What sort of a gun was it?

A. A cap gun.

Q. Did you see John Troglia when he went into the water?

A. Yes, sir.

Q. Was the watchman there at that time?

A. No, sir.

~~No, sir.~~

Q. Where was the watchman then?

A. He went in the pump house.

Q. How many boys were in the water when John Troglia went in?

A. There was about four.

Q. Did you watch John Troglia after he went into the water?

A. Yes, sir.

Q. Did you see him when he was drowning?

A. Yes, sir.

Q. Now, just tell these gentlemen how it happened that John Troglia was drowned.

MR. SANDERS: That is objected to as immaterial. It is conceded.

Which objection was by the Court overruled.

To which ruling of the Court in overruling said objection, defendant, by counsel, then and there duly excepted.

A. He went from the low part and swam to the east part, and then he hollered for help a couple of times, and he was going up and down in the water, and the third time he went down under the water.

Q. How far were you from him at that time?

A. About fifteen feet.

Q. About where around the pond was it that he was drowned; about what point? Could you look at this map over there; do you understand this map?

A. Yes, sir.

Q. You recognize this part here marked with yellow or brown as the dam

A. Yes, sir.

Q. And this part in blue is the pond?

A. Yes, sir.

Q. Now, point out to these gentlemen about where it was that John Troglia dropped into the water?

A. Right about here.

Q. Mark there with the letter "B".

A. (Marking the letter "B".)

Q. About how deep was the water there, or do you know?

A. About ten feet; it was just a little past the gage at the time.

Q. Was the water over your head at that place?

A. Yes, sir.

Q. Was it over John Troglia's head?

A. Yes, sir.

Q. Was there anybody near John Troglia at the time that he died?

A. No, sir.

Q. At the time that he went down, rather?

A. No, sir.

THE COURT: Wasn't it testified that there were two drowned there at once?

MR. WALKER: No; one witness brought out the fact that he brought a boy out.

MR. KREMER: Yes; the other boy was nearly drowned at just about the same time.

THE COURT: All right; I didn't know whether there were two boys struggling together or something.

Q. What was the first thing that attracted your attention to the fact that John Troglia was in trouble; what made you think that there was something wrong?

A. I thought he was only playing in the water when he was drowning.

Q. You thought he was only playing when you heard him shout?

A. Yes, sir.

Q. You didn't think he was drowning?

A. No, sir.

Q. When was it that you first realized or first knew that he was drowning?

A. When the boys swam for him and he went down before they got up to him.

Q. You were not in the pump house during the year 1918 were you?

A. No, sir.

Q. And this was the only time that you had been up at the dam?

A. Yes, sir.

CROSS EXAMINATION.

BY MR. KREMER:

Q. You thought that John was only playing when he was calling for help, because you knew he was a good swimmer?

A. Yes, sir.

Q. And he was a good swimmer?

A. Yes, sir.

Q. Strong?

A. Yes, sir.

Q. A healthy boy?

A. Yes, sir.

Q. A bright boy?

A. Yes, sir.

Q. Did you see those signs around there?

A. Yes, sir.

Q. What did they read?

A. "No trespassing;" "Danger, keep out;" and "Private property."

Q. "Ten feet deep"?

A. Yes, sir.

Q. Was that also on one of them?

A. Yes, sir; that is all I saw.

Q. Do you know what that meant, those signs; did you know what the signs meant?

A. Yes, sir.

Q. What did they mean?

A. To keep out; to keep out of the pond; and no trespassing is that no one is to go past that way, to go past the water.

Q. Well, you knew it meant, generally for you boys to stay away from there, didn't you?

A. Yes, sir.

Q. John could read, could he?

A. Yes, sir.

Q. How many times had you seen him going in and out of the water that day?

A. Twice.

Q. And each time he started out swimming fine and strong?

A. Yes, sir.

Q. Do you know what hapuened him out there in that deep water?

A. No, sir.

Q. When you last saw him in the water he was swimming along well and having no trouble?

A. Yes, sir.

Q. And how long had he been in the water when he hollered for help and sank?

A. About ten minutes.

Q. Now, referring to this pond in the year, 1917, that is, the year before the one when John was drowned, you say the water was not over your head in places?

A. No, sir.

Q. And you were a little bit smaller then than you are now?

A. Yes, sir.

Q. Have you any idea how much you have grown since the summer of 1917?

A. No, sir.

Q. A couple of inches?

A. Yes, sir.

Q. And do you know how tall you are now?

A. About four feet.

Q. I guess you are taller than that; just stand up so the jury may see you.

(Witness stood up.)

Q. In the year 1917 the water was not over your head in that pond?

A. No, sir.

Q. Now, what kind of looking man was this pump-man that you saw around there.

A. He had a little mustache.

Q. That is the man that was there at the time that Troglia was drowned?

A. Yes, sir.

Q. By the way, did you see a raft on the bank there, a broken raft?

A. Yes, sir.

Q. Tell the jury about the broken raft.

A. I just saw it there; I didn't know who broke it.

Q. Pulled out on the bank?

A. Yes, sir.

Q. What was that raft; what do you mean by a raft?

A. Like a little boat to ride on the water.

Q. Did you ever see the boys playing there with that raft before?

A. No, sir.

Q. Were any of the planks gone off this raft when you saw it on the bank that day?

A. Yes, sir.

Q. Somebody had broken them off?

A. Yes, sir.

Q. Do you know who did it?

A. No, sir.

Q. How far from Meaderville is this pond.

A. About a mile.

Q. And where is it that you boys go to school?

A. It is in the McQueen Addition.

Q. How far is this pond from the school in the McQueen Addition?

A. It is further than from Meaderville to the pond.

Q. Over a mile?

A. Yes, sir.

Q. Where did John Troglia live?

A. I don't know.

Q. Well, you knew he lived in Meaderville?

A. Yes, sir.

Q. In order to go to this pond from either Meaderville or from the school, it was necessary for you boys to walk away from Meaderville or from the McQueen Addition, the school, over a mile before you could reach this pond at all?

A. Yes, sir.

Q. This pond was not along the way that you boys would usually go in going to school or coming from school or going home to Meaderville, was it?

A. No, sir.

Q. It was away out of the way?

A. Yes, sir.

Witness excused.

JOHN H. McINTOSH,

A witness for the plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. TOM WALKER:

Q. Mr. McIntosh, besides being Fuel Administrator, what, if any, position did you occupy in Silver Bow County, Montana, during the years 1918 and 1919?

A. Manager of the Associated Industries of Montana.

Q. And as such manager of the Associated Industries of Montana are you familiar with the going rate of wages for the various grades in the county of Silver Bow?

A. I am.

Q. It is your business to be familiar with them?

A. Yes, sir.

Q. Were you familiar with the going wage in 1918 and 1919 for an apprentice to mechanics and electricians, and elevator boys and newsboys and news carriers and boys who drive trucks, and the wage of miners and that sort of thing?

A. Yes, sir, generally familiar with them.

Q. What was the prevailing wage in 1918, and what is the prevailing wage in 1919 for news carriers?

A. News carriers draw a dollar a day or thirty dollars a month.

Q. And elevator boys?

A. Pardon me on that question I will make a correction about news carrier. News carriers during the summer draw thirteen dollars a month and fifteen dollars in winter. Elevator boys draw a dollar a day or thirty dollars a month.

Q. And apprentice helpers or apprentice to machinists?

A. Apprentices to mechanists draw one dollar less than journeymen, which during the past year has been for apprentices four dollars and seventy-five cents.

Q. That is for 1918 and 1919?

A. Yes, sir.

Q. And electrician's helpers?

A. The same applies in mechanics, in the different mechanical departments around the mines and smelters.

Q. For the years 1918 and 1919?

A. Yes. You will understand, Mr. Walker, that the wages are more or less movable, as they have been paid on a sliding scale according to the cost of copper.

Q. Are you familiar with the going wage for boys who drive these light Ford trucks around the city for the merchants?

A. Yes, sir.

Q. And what were they getting in 1918 and 1919.

A. There is a regular printed scale for all the boys and teamsters, and I happen to have that here. However, I will tell you that that is for boys under twenty years of age, which means probably boys from fourteen to twenty, very few under fifteen are employed at that work. For two horse teams they get two dol-

lars and thirty-five cents a day, and general work, including produce and commission house drivers on those light trucks, four dollars and twenty-five cents, and it will range from four dollars to four dollars and thirty-five cents; not under four and not over four thirty-five.

Q. And for boys employed in and about the stores of the city, butcher shops and drug stores and grocery stores, etc., what is the going wage for them?

A. There is no fixed wage, because that work would be classed as odds and ends, and there is no union to cover it; but the rate for elevator boys is around thirty dollars a month or a dollar a day, and ranging from that wage up to drives for four dollars to four dollars and thirty-five cents a day, it would be somewhere between them, and striking mene average, I should say that the wage for boys for that kind of work would be around two dollars a day.

Q. And boys employed in the messenger service of the city?

A. I am not familiar with that; I am sorry that I cannot tell you.

Q. What was the prevailing wage of miners during the year 1918 and 1919?

A. During 1918 and until early in this year it was five dollars and seventy-five cents per day for miners. It was reduced early in this year to four seventy-five, and is now five seventy-five again. The laborers get five dollars a day in the Butte district.

CROSS EXAMINATION.

BY MR. SANDERS:

Q. Mr. McIntosh, are you familiar with the age of elevator boys, the average age?

A. Captain, I cannot say that I am, further than just from observation. I don't believe there is any particular age limit. Sometimes men run elevators. In the office building in which I have an office there are two boys engaged, one I should say is about fourteen and the other about sixteen or seventeen.

Q. Below fourteen they don't employ boys to run elevators?

A. I don't believe so.

Q. Not boys eleven years of age?

A. I don't believe so.

Q. Boys from fourteen to fifteen and on up?

A. I believe so, yes, sir.

Q. You say apprentices draw four dollars and seventy-five cents, is that your testimony?

A. Yes, when the journeymen's wages is five seventy-five the apprentices for most of the mechanical trades in town give a dollar less.

Q. Is there any custom or rule with reference to the age of apprentices; that is, below what age do they employ boys as apprentices?

A. I believe that varies with the unions, Captain, but I cannot say that I am familiar with the age. I am under the impression, however, that there is a minimum age limit, beyond which they will allow apprentices to work.

Q. They do not allow a boy below eighteen to work as an apprentice, do they?

A. I am not familiar with the union rules in that respect.

Q. There are no boys of the age of eleven employed as apprentices?

A. No, they wouldn't be of any use.

Q. They have to be boys of mature judgment before they are put in a position of that kind?

A. I should say so, though I cannot say what the minimum age is.

Q. Now, truck drivers; boys eleven years of age do not drive trucks in town, do they?

A. No.

Q. As a matter of fact, they are not permitted to drive trucks, under the law, under the age of sixteen?

A. It either fifteen or sixteen; it is along there.

Q. And what do you say they get, truck drivers?

A. Not under four dollars and not to exceed four dollars and thirty-five cents a day.

Q. Now, about butcher shops? *boys*

A. Butcher shop boys, Captain, are in about the same classification as drivers for small grocery stores and in the wholesale district.

Q. From your observation do you know anything about the average age of those who are employed as butcher shop boys?

A. Well, from observation I would say that the average will range between fifteen and nineteen years.

A. And what have you to say about boys employed in drug stores?

A. You mean messenger boys and carriers of parcels and drivers?

Q. There was something mentioned by counsel about boys employed in drug stores; I presume messenger boys delivering drugs.

A. Yes, I would take it from observation that they run about the same as the average messenger boy or driver, possibly ranging from fifteen to nineteen.

Q. You say miners at the present time draw five dollars and seventy-five cents

A. Yes, sir.

Q. The wage was reduced to four dollars and seventy-five, and then it was raised?

A. Yes, sir; the apprentices draw a dollar less in most of the metal trades.

Q. In your experience in these positions which you have held, can you advise the jury about the average of miners; the average age at which men or boys are employed in the mines?

A. Occasionally you will see one under age, but they almost certainly average considerably above a man's majority.

Q. The average age of miners is above twenty-one years?

A. Oh, yes, considerably.

Q. And you have the same thing to say with reference to laborers?

A. Yes, sir.

RE-DIRECT EXAMINATION.

BY MR. TOM WALKER:

Q. What have you to say as to whether or not the tendency of the wage in all of those classes that you have mentioned is upward?

A. I don't quite catch the meaning of your question.

Q. What have you to say as to whether or not the tendency of these values that you have fixed, the scale of wages that you have fixed is one going upward?

A. You mean progressively with one's age?

Q. Yes, and with the difference of the times as you find them now.

A. Most assuredly it has been upward, yes, sir.

Q. Increasing

A. Yes, sir.

Witness excused.

ARTHUR W. MERKLE,

A witness for plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. TOM WALKER:

Q. State your name.

A. Arthur W. Merkle.

MR. WALKER: It seems to be agreed between counsel for the plaintiff and defendant that the record may show that if Mr. Troglia was called to the stand, the father of the boy, John Troglia, he would testify that his age was forty-six.

MR. SANDERS: Yes, but not conceding that it is material or competent.

Q. What is your business or occupation?

A. State Manager of the Prudential Insurance Company of Montana.

Q. How long have you been engaged in the insurance business?

A. Four years.

Q. Where?

A. In the state of Montana.

Q. As such insurance man are you familiar with any book or standard of statistics which is used by the insurance companies generally throughout the United States?

A. Yes, I have the Stanley standard established by all the standard companies, which they call the Experience Table of Mortality.

Q. What is an annuity?

A. Well, a certain amount of money is paid into the insurance company, which assures a man a set income for life, a certain amount paid in one lump sum, which assures him of a certain amount during his lifetime.

Q. From your experience as an insurance man are you familiar with the period of life expectancy of men?

A. I can quote from the tables I mentioned, yes, sir.

Q. Have you that table with you?

A. Yes, sir.

Q. What have you to say would be the expectancy of a man twenty years of age?

MR. SANDERS: That is objected to as incompetent, irrelevant and immaterial in this case.

Which objection was by the Court sustained.

To which ruling of the Court in sustaining said objection, plaintiff, by counsel, then and there duly accepted.

Q. What have you to say from that table as to what is the expectancy of life of a man forty-six years of age?

MR. SANDERS: The same objection.

THE COURT: I cannot see how it is material.

MR. WALKER: It is merely to show the expectancy of man. Also the expectancy of a boy of twenty, because the insurance tables do not go below that age, down to a boy of eleven. It is to prove our damage.

THE COURT: What would be the rule of damage?

MR. WALKER: The damage would be the damages that he suffered from the death.

THE COURT: These expectancies are not material.

MR. WALKER: Only as a guide.

THE COURT: Oh, no. Objection overruled.

To which ruling of the Court in overruling said objection, defendant, by counsel, then and there duly accepted.

A. 23.81 years.

THE COURT: You may repeat the question as to the boy.

Q. What is the expectancy of a boy twenty years of age?

A. 42.20 years.

Q. Have you any figures showing the expectancy of life of a boy of eleven, and if not, why?

A. Well, I have never heard of a table where they have arrived at anything for a boy from eleven to twenty years, for the reason, I imagine, that owing to the many illnesses that the younger people are subject to, it would be hard to figure.

Q. You do not accept risks from boys under that age?

A. Well, they do, but not on an examination. They don't do it in this state.

Q. What would it cost for an annuity for a man twenty years of age of six hundred dollars per annum?

A. \$12,136.00.

Q. And what would it cost to get an annuity of six hundred dollars per annum for a man forty-six years of age?

A. \$8,994.00.

Cross examination waived.

WITNESS EXCUSED.

JOHN R. REED, a witness for plaintiff, after being duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. TOM WALKER:

Q. State your name.

A. John R. Reed.

Q. What is your business?

A. Undertaker.

Q. Are you acquainted with Martin Troglia, the plaintiff in this case?

A. I have seen him, yes, sir.

Q. You are the manager and president of the Sherman & Reed Company?

A. Yes, sir.

Q. I will ask you whether or not your company during the month of June, 1918, prepared for burial and buried John Troglia, the minor child of Martin Troglia?

A. Yes, sir.

Q. What were the expenses entailed by Martin Troglia with your company for the burial of this minor son, John Troglia?

A. Two hundred and forty-three dollars.

Q. What did that include, Mr. Reed?

A. That included the casket, the outside box, the care of the body, the hearse coach and four cabs, four limousines, the paper notice, the grave, and the ground and the opening of the grave, and three cards of thanks after the funeral.

Q. Did that include the lot in the cemetery?

A. Yes, sir.

Q. You paid for that out of this sum?

A. Yes, sir.

Q. What have you to say with reference to whether or not the sum you have just mentioned was a reasonable sum for the burial of a child of that age during the month of June, 1918, in the County of Silver Bow County, Montana.

A. That was a reasonable charge.

Cross examination waived.

WITNESS EXCUSED.

MARTIN TROGLIO, plaintiff, recalled in his own behalf:

DIRECT EXAMINATION.

BY MR. FRANK WALKER:

Q. What have you to say, Martin, with reference to whether or not your son, John, was a loving and affectionate boy?

MR. SANDERS: That is objected to on the ground that it is incompetent, irrelevant and immaterial.

THE COURT: Oh, it might have its bearing on the question of how much the boy would contribute to the father. If he was an affectionate boy the inference might probably be that he would contribute more than otherwise. The objection is overruled.

To which ruling of the court in overruling said objection, defendant, by counsel, then and there duly excepted.

A. My boy could help me now this day to make my living, because I am sick; I couldn't do nothing in the mine, and no work at all, and he could help me.

MR. SANDERS: That is objected to.

MR. WALKER: That may be stricken.

THE COURT: It is stricken.

Q. What have you to say about his being loving, and having regard and care for you?

A. He was regard and care; he was the best I have. And time I go out and come back he was just like a man that never see me for ten or fifteen years, and he just love me all the time I come home from work or anything.

Q. What have you to say with reference to whether or not he was obedient and obeyed your commands and directions?

MR. SANDERS: The same objection.

Which objection was by the court overruled.

To which ruling of the court in overruling said objection, defendant, by counsel, then and there duly excepted.

Q. Did he do what you told him to do?

A. He do everything I told him; everything I told him he was doing.

Q. What have you to say with reference to whether or not he helped you about the house or yard?

A. Well, he was doing anything the best he can, sawing wood, and I had a couple of cows, and sometimes he would come and help me to milk the cow and do anything he can to help; he was good at that.

CROSS EXAMINATION.

BY MR. KREMER:

Q. Have you any other children?

A. Yes, sir.

Q. How many?

A. I have got six children.

Q. How old is your oldest?

A. The oldest one is twenty-three.

Q. That is Pete?

A. That is Pete.

Q. What does Pete do?

A. Well, he is running a butcher shop.

Q. Down in Meaderville?

A. Yes, sir.

Q. Now, your next child?

A. The next child is a girl; she is Mary.

Q. And how old is she?

A. Well, she is twenty.

Q. Then, the next one?

A. The next one is sixteen.

g a boy or girl
A. A girl.

Q. She goes to school?

A. Well, she just quit the school this year.

Q. What is she doing?

A. Well, working around the house.

Q. Then, your next one?

A. The next is twelve, a girl.

Q. She is going to school?

A. Going to school.

Q. Does Pete own this butcher shop?

A. Well, Pete don't own the butcher shop; he owns part, and his partner owns the other.

PLAINTIFF RESTED.

MR. SANDERS: Comes now the defendant and moves the court to direct the jury to return a verdict

on behalf of defendant and dismiss the action for the following reasons:

That the said complaint does not set forth ^{facts} sufficient to constitute a cause of action nor any actionable negligence on the part of the defendant; that the dam or reservoir mentioned in plaintiff's complaint is not such an attractive nuisance as to bring it under the rule that renders the defendant laible to children of tender years for maintaining such dam or reservoir, as charged in the plaintiff's complaint as being an attractive nuisance; that the defendant is not liable for maintaining the same without any fence or without a watchman to warn minor children from trespassing in the same; that the artificial reservoir is not within the doctrine of attractive nuisances, whereby children of tender years are allured thereto to their injury; that in this case defendant had no further duty to the plaintiff or the minor son of plaintiff than not to wilfully or ~~wrongfully~~ ^{wantonly} injure them. That it is the theory or assumption of the plaintiff, as appears from the plaintiff's complaint, that it is a duty that devolves on the defendant by law to enclose that dam by a fence or other barriers, and not to suffer the same to remain open, and that it was the duty of the defendant to provide a watchman to warn, either minor children generally or plaintiff's son particularly against entering the same to swim; that under the law none of such duties are required of such defendant. Actionable negligence arises only from the failure to perform a legal duty; that there is not

sufficient competent evidence proving or tending to prove that the defendant was negligent in failing to guard a dangerous instrumentality, the dangers of which were concealed or hidden; that there is not sufficient competent evidence that the defendant had any knowledge of the presence of said minor son at or in said reservoir at or prior to the time that he was drowned; that there is not sufficient competent evidence that the defendant then knew or by the exercise of ordinary care could have known that said minor child was in peril or likely to be injured or drowned. That in the absence of actual knowledge on the part of the defendant or its servants or agents that said minor son was swimming in said pond, no duties devolve on the defendant as a matter of law to prevent his being there. That it has not been made to appear by sufficient competent evidence that the deceased son was incapable of appreciating the dangers ~~that~~^{he} was in entering into said reservoir or in swimming therein, which must not only be alleged, but established by a preponderance of the evidence. On the other hand, the uncontradicted testimony on behalf of the plaintiff is that John Troglio, the deceased son, was a bright, intelligent boy for his age of eleven years, could read, and was a good swimmer for his age and an athlete. That there is not sufficient competent evidence herein warranting a recovery on the theory that the deceased was rightfully on the said premises of the defendant, either by invitation or license. And finally, there is no sufficient competent or substantial evidence to prove the negligence alleged.

Argument by counsel.

THE COURT: At the conclusion of the plaintiff's case the defendant moves the court to direct a verdict in its favor. That motion challenges the sufficiency of the evidence to sustain a verdict in favor of the plaintiff, if the jury should find one, and it immediately resolves itself into a question of law for the court to decide, whether or not the evidence is sufficient, if it went to the jury and the jury should find a verdict for the plaintiff, to sustain a verdict. If in the judgment of the court, as a question of law, the evidence is not sufficient to sustain a verdict for the plaintiff, if the jury should find one, then it is the duty of the court to direct a verdict in favor of the defendant, and in this case the court will do so, its judgment being that the evidence would not sustain a verdict for the plaintiff.

Briefly, in order that it may appear in the record, the court is satisfied that, as against a general demurrer the complaint states a good cause of action for the negligence of the defendant. It charges that the boy who was drowned was eleven years old; that the defendant built an artificial dam, a hundred by seventy-five feet, one to twelve feet deep, not enclosed, and no watchman, within twenty-five feet of a highway over which this boy and many other people were habited to pass; that the water was fifty degrees cold; that the defendant knew that this place would allure children to swim; that it was its duty to warn them of the danger; that they negligently suffered the boy

and others to go swimming and bathing in the cold water, and while the boy who was drowned was bathing, he sank and was drowned. The general demurrer only challenged the general sufficiency, not in detail. Under that demurrer it might have been open to proof that this pond was one in the character of a deception; that this boy could not swim; that he was not of the average intelligence of his own age; that walking along the shore, wading, he suddenly stepped into a deep and obscure hole and was drowned, and other items of that sort might have been introduced in evidence under that complaint, which might well have warranted the case going to the jury for its determination. But when we come to the evidence we find a different situation. Here we find a boy—in the first place we find that it was not near a road that was habitually travelled by this boy and other boys, though that is not material in any phase of the case. After all the location of the pond only goes to what the defendant ought to anticipate and its knowledge, and that might have been well proven by other evidence in the case, as to what the defendant should have anticipated and its knowledge.

Here was a boy eleven years old. He was a strong boy for his age, somewhat athletic and a good swimmer, and a boy who was well able to read, and we find a number of signs there—none of those things appear in the complaint—we find also that the company had exercised some reasonable degree of care to warn people of the danger, and boys; that they

placed a sign: "Danger, ten feet deep, keep off," "No trespassing," and the like, which this boy could read, or any other boy of his age.

Now, it appears from the evidence that the season before this accident happened—because the court will finally say in this case that nobody was guilty of any negligence, neither the company nor the boy—it was an accident pure and simple; the boy was conducting himself properly under the circumstances, being a strong boy and a boy well able to swim, and the fact is after all, when he did drown, it was because he had stayed around there, in and out of the water, so long that he was either exhausted, or what is more probable he was seized by cramps and sank, because the two boys that saw him when he drowned, say he had been there about two hours and before they had been there, and all that time in and out of the water; that he was swimming well before and at the time that he went down; that he swam from the low water out and over the deep water, and suddenly threw up his hands and hollered and sank. I think there can be only one inference, that he was seized with cramps.

But however that may be, the law is that every person must so care for his own and use his own that it causes no unnecessary harm to others, and that every one who his any sort of premises or business house or farm or, as in this case, a pond, or a mine, shall have it reasonable safe for the visits of any one who mthey invite there expressly or impliedly. That is the duty which the law imposes upon anybody, and

the grade of that duty differs with different persons. A grown man who comes upon your premises, your duty is not so great toward him. A boy of twelve or fifteen or sixteen, your duty would be a little more than for a man, but not so great as it would be for children of three or four or five or six, if you invite them upon your premises expressly or impliedly. An express invitation, of course, means when you tell them to come; an implied invitation may arise out of the circumstances, if you have a place attractive to children especially, which has instrumentalities upon it with which they like to play, and if you have, then you ought to anticipate that they will come if you have, then you ought to anticipate that they will come if you place it near where there are large groups or numbers of children. If you place it where you know that children are accustomed to be and find it, then you have got to see to it that it is reasonably safe in due proportion to the helplessness or the sense of the child or the man. I still think that if it had appeared in evidence that little children of three or four or five years of age were coming around this pond, if such a case had been made here, it would have been within the turntable doctrine. This is nothing more than a phase of the general law; it is part of the general law; it comes right back to the proposition that premises must be kept reasonably safe to those who are impliedly invited there. But there is great danger in carrying it too far. You may say that a man should not plant a tree in his yard be-

cause children might climb it and fall, and to a certain extent there may be some truth in that. For instance, if a man set up ladders outside of his house, and if he knows children are accustomed to climb up and play on his roof, if he lets little children not capable of caring for themselves, go up there, three or four or five or six years old, I imagine he still might be held liable, where he would not be for a child twelve or thirteen or fourteen or fifteen. Other circumstances might be imagined.

But to get right back to this case, here is a boy against whom the defendant, as the court sees it, neglected no ~~duty~~ ^{duty B.}. They had a pond there; every one has a right to have such things on their premises if they are useful, ~~within the bounds of the statute.~~ ^{B.} This boy was strong; he was able to swim, and apparently to swim for a long time. Defendant has no reason to anticipate that he was not able to care for himself; defendant had no reason to furnish him a guard nor a fence nor anything else. He was not negligent in going there, because you might then say that of any person if they go in bathing, that they are negligent, but they are not, if they are able to swim; they are able to take care of themselves. If misfortune comes to them, and anything happens, chance or anything else, or if they stay in till they are exhausted and they sink in deep water, it is an accident and nothing else, and the court places its decision in this case on that basis. The defendant was not negligent, consequently not negligent as far

as this boy is concerned. Consequently the court will instruct the jury to return a verdict in favor of the defendant. The record is small in this case and can be readily carried further if counsel desires.

Exception of the plaintiff to the ruling of the court noted and thirty days extra time allowed plaintiff to prepare, serve and file a bill of exceptions.

I, George H. MacDougall, do certify that I am a reporter of many years' experience do hereby certify that I reported the above entitled cause in the United States Court, district of Montana, before Hon. George M. Bourquin, Judge thereof, and a jury, on the 21st and 22nd days of November, 1919, in Butte, Montana; that the above and foregoing transcript from page 1 to page ~~120~~⁵⁷ inclusive, is a full, true and correct transcript of my shorthand notes of said testimony to the best of my skill and ability.

Witness my hand this 30th day of January, 1920.

G. H. McDOUGALL,

Reporter.

(TITLE OF COURT AND CAUSE.)

This cause coming on this day regularly further to be heard upon the application of the plaintiff by Messrs. Walker & Walker, his attorneys, appearing herein through I. Parker Veazey, Jr., an attorney acting for the plaintiff in the presentation of this motion at the instance of his said attorneys, for good cause shown;

IT IS HEREBY ORDERED that the time within which the plaintiff may prepare and serve his Bill of Exceptions to the rulings made, and the proceedings had on the trial of the above entitled cause be, and the same hereby is, extended to and including the first day of February, A. D. 1920. \

Done in open court this 31st day of December, 1919, and ordered entered as above.

BOURQUIN,
Judge.

Service of the foregoing bill of exceptions acknowledged and copy received this.....*30*.....day of January, 1919. *Subject to all legal objections and exceptions to be hereafter made.*

KREMER, SANDERS & KREMER,

Attorneys for Defendants.

The foregoing bill of exceptions is this 13th day of February, 1920, hereby signed, settled and allowed as true and correct and ordered filed.

BOURQUIN,
Judge.

(TITLE OF COURT AND CAUSE.)

No. 286.

Order Directing Verdict.

Counsel for respective parties present as before and trial of cause resumed. Thereupon Joseph Darin, Nicholas Faboltz, John H. McIntosh, Arthur W. Merkle, and J. R. Reed, were sworn and examined as witnesses for plaintiff and Martin Troglio recalled, whereupon plaintiff rested. Thereupon counsel for defendant moved the court to direct a verdict herein in favor of the defendant upon the ground that the complaint does not state facts sufficient to constitute a cause of action or any actionable negligence upon the part of the defendant which motion was duly argued, submitted to the court and taken under advisement, the jury being excused until 1:30 p. m. Thereupon after due consideration court ordered that defendant's said motion be and is granted, that a verdict in favor of the defendant and against the plaintiff be, and hereby is entered by the clerk and jury discharged from further consideration of the cause; to which ruling of the court the plaintiff then and there excepted the exception noted. Thereupon the plaintiff was granted thirty (30) days additional time within which to prepare and serve a Bill of Exceptions herein.

~~In re excuse of Jurors. Entered in open court this second day~~

~~Ordered that all trial jurors now in attendance be excused for the terms.~~

~~Court thereupon adjourned until 10 a. m. Monday next.~~

~~G. R. GARLOW, Clerk,~~

~~By L. R. POLGLASE, Deputy.~~

Attest: C. S. G. [unclear]

(TITLE OF COURT AND CAUSE.)

No. 286.

Judgment.

This cause coming on regularly for trial on the 21st day of November, 1919, in the above entitled court, plaintiff appearing in person and by counsel, Messrs. Walker & Walker and C. S. Wagner, Esq., and the defendant appearing by counsel Messrs. Kremer, Sanders & Kremer, ^a the jury of twelve (12) good and lawful men were duly impaneled and sworn to try said cause; whereupon witnesses upon behalf of plaintiff and ^{were duly sworn and testified on the witness stand} counsel for plaintiff having announced in open court that they had rested their said case thereupon counsel for the defendant in open court moved for a directed verdict in said cause in favor of the defendant and against the plaintiff and said motion having been duly argued by respective counsel and considered by the court the same was on the 22nd day of November, 1919, by the court duly and regularly sustained.

in behalf of plaintiff

And now upon consideration by the court of the premises it is hereby ORDERED, ADJUDGED, AND DECREED, that the said plaintiff have and recover nothing from the said defendant and that defendant have and recover of the plaintiff, its costs and disbursements incurred in said action and taxed at the sum of \$ 54.⁰⁰.....

Dated this 22nd day of November, 1919.

Entered November 26, 1919.

C. R. GARLOW, Clerk,

By L. R. POLGLASE, Deputy.

Attest and true copy of Judgment.

C. R. GARLOW, Clerk,

By L. R. POLGLASE, Deputy.

(TITLE OF COURT AND CAUSE.)

Petition for Writ of Error.

To the Honorable George M. Bourquin, Judge of the District Court Aforesaid:

Now comes Martin Troglio, plaintiff above named, by Walker & Walker, and C. S. Wagner, his attorneys, and respectfully shows that on the 21st day of November, 1919, the court directed a verdict, by a jury duly impaneled against your petitioner and in favor of the Butte-Superior Mining Company, a corporation, defendant, and upon said verdict a final judgment was entered on the 26th day of November, A. D., 1920, against your plaintiff petitioner, and in favor of the defendant.

Your petitioner, feeling himself aggrieved by the said verdict and judgment entered thereon as aforesaid, herewith petitions the court for an order allowing him to prosecute a writ of error to the Circuit Court of Appeals of the United States for the ninth circuit under the laws of the United States in such cases made and provided.

Wherefore, premises considered, your petitioner prays that a writ of error do issue that an appeal in this behalf to the United States Circuit Court of Appeals aforesaid, sitting at San Francisco, in said circuit for the correction of the errors complained of and herewith assigned, be allowed and that an order be made fixing the amount of security to be given by plaintiff in error conditioned as the law directs, and upon giving such bond as may be required that all further proceedings may be suspended until the determination of said writ of error by the Circuit Court of Appeals.

WALKER & WALKER,

C. S. WAGNER,

Attorneys for Petitioner in Error,

307 Daly Bank, Butte, Mont.

(TITLE OF COURT AND CAUSE.)

Assignment of Errors

Number 286.

Now comes Martin Troglio, plaintiff in error, in the above entitled cause, and in connection with his petition for a writ of error in this cause assigns the following errors which plaintiff in error avers occurred on the trial thereof, and upon which he relies to reverse the judgment entered herein as appears of record:

1.

The court erred in granting a motion to return a verdict in favor of the plaintiff in this cause for the reason that the evidence conclusively shows that the plaintiff's deceased minor son was an infant, eleven years of age, at the time he was drowned in the artificial dam and reservoir, maintained by the defendant, and non sui juris, and was upon the premises of the defendant and swimming in said pond upon the invitation of the defendant and the question of his contributory negligence was, and is a question of fact to be resolved by the jury and not a question of law, to be determined by the court.

2.

The said court erred in charging the jury as follows:

"If in the judgment of the court, as a question of law, the evidence is not sufficient to sustain a verdict for the plaintiff, if the jury should find one, then it is the duty of the court to direct a verdict in favor of the defendant, and in this case the court will do so, its judgment being that the evidence would not sustain a verdict for the plaintiff." Because the question of the negligence of the defendant and the contributory negligence of the plaintiff's deceased minor son were and are questions of fact to be resolved by the jury, and not questions of law, to be determined by the court.

3.

The said court erred in charging the jury as follows:

“Here we find a boy—in the first place we find that it was not near a road that was habitually travelled by this boy and other boys, though that is not material in any phase of the case. After all the location of the pond only goes to what the defendant ought to anticipate and its knowledge, and that might have been well proved by other evidence in the case, as to what the defendant should have anticipated and its knowledge.” Because the evidence conclusively shows that there was a Public Highway within twenty-five feet of the north edge of said artificial pond and that it, and the contiguous territory was habitually travelled by boys of tender age who were allured to said pond by its attractive characteristics for swimming and bathing purposes.

4.

The said court erred in charging the jury as follows:

“Here was a boy eleven years old. He was a strong boy for his age, somewhat athletic and a good swimmer, and a boy who was well able to read, and we find a number of signs there—none of these things appear in the complaint—we find also that the company had exercised some reasonable degree of care to warn people of the danger, and boys; that they placed a sign: “Danger, ten feet deep, keep off.” “No trespassing,” and the like, which this boy could read, or any ^{other} boy of his age.” Because the evidence shows without contradiction, that defendant had a watch-

man in charge of a pump station located within twenty-five feet of said pond, who suffered and permitted children of tender years, including plaintiff's minor son to go swimming and bathing therein, without protest, but with acquiescence and consent of the defendant, whereby the signs adverted to were wholly disregarded by said children.

5

The said court erred in charging the jury as follows:

"Now, it appears from the evidence that the season before this accident happened—because the Court will finally say in this case that nobody was guilty of any negligence, neither the company nor the boy—it was an accident pure and simple; the boy was conducting himself properly under the circumstances, being a strong boy and a boy well able to swim, and the fact is after all, when he did drown, it was because he had stayed around there, in and out of the water, so long that he was either exhausted, or what is more probable, he was seized by cramps and sank, because the two boys that saw him when he drowned, say he had been there about two hours and before they had been there, and all that time in and out of the water; that he was swimming well before and at the time that he went down; that he swam from the low water out and over the deep water, and suddenly threw up his hands and hollered and sank. I think there can be only one inference, that he was seized with cramps."

Because the question as to whether the drowning was an accident or was due to defendant's negligence was, and is, a question of fact to be resolved by the Jury and not one of law, to be determined by the court.

6

The said court erred in charging the jury as follows:

"A grown man who comes upon your premises, your duty is not so great towards him. A boy of twelve or fifteen or sixteen, your duty would be a little more than for a man, but not so great as it would be for children of three or four or five or six, if you invite them upon your premises expressly or impliedly."

7

The said court erred in charging the jury as follows:

"For instance, if a man set up ladders outside of his house, and if he knew ^{over} children are accustomed to climb up and play on his roof, if he lets little children not capable of caring for themselves, go up there, three or four or five or six years old, I imagine he still might be held liable, where he would not be for a child twelve or thirteen or fourteen or fifteen. Other circumstances might be imagined."

The ^{said} court erred in charging the jury as follows:

"But to get right back to this case, here is a boy against whom the defendant, as the court sees it, neglected no detail. They had a pond there; every one has a ^{right} ~~right~~ to have such things on their premises

if they are useful, within the bounds of the statute. This boy was strong, he was able to swim, and apparently to swim for a long time. Defendant had no reason to anticipate that he was not able to care for himself; defendant had no reason to furnish him a guard nor a fence nor anything else." Because the question as to whether said boy was sui juris, was a question of fact to be determined by the jury, and not a question of law, to be determined by the court.

9

The said court erred in charging the jury as follows:

"He was not negligent in going there, because you might then say that of any person if they go in bathing, that they are negligent, but they are not, if they are able to swim; they are able to take care of themselves. If misfortune comes to them, and anything happens, chance or anything else, or if they stay in till they are exhausted and they sink in deep water, it is an accident and nothing else, and the Court places its decision in this case on that basis." Because questions of accident and negligence as disclosed by the evidence in this case, were and are questions of fact to be decided by the jury and not by the court.

The court erred in directing the jury to return a verdict in favor of the defendant as follows:

"The defendant was not negligent, consequently not negligent as far as this boy is concerned. Conse-

quently the Court will instruct the jury to return a verdict in favor of the defendant.”

WALKER & WALKER,
C. S. WAGNER,
Attorneys for plaintiff in error.
307 Daly Bank Bldg., Butte, Mont.

Read on application for Writ of Error.....
1920.

(TITLE OF COURT AND CAUSE.)
(Prayer for Reversal)

To the Honorable, the Circuit Court of Appeals of
the United States, for the Ninth District.

Now comes Martin Troglia, the plaintiff in error,
and prays for a reversal of the judgment of the Dis-
trict Court of the United States for the District of
Montana, which judgment was made, rendered and
entered in the office of the Clerk of the District Court
of the United States for the District of Montana, on
or about the 26th day of November, 1919.

WALKER & WALKER,
C. S. WAGNER,
Attorneys for Plaintiff in Error.
307 Daly Bank Bldg., Butte, Mont.

(TITLE OF COURT AND CAUSE.)

No. 286.

Waiver of Citation.

Whereas in the above entitled cause the plaintiff has petitioned for a writ of error and accompanied the same with an assignment of errors and a prayer for ~~the~~^{the} reversal of the judgment made, rendered, and entered in the above entitled cause on the 26th day of November, 1919.

It is stipulated and agreed by and between plaintiff and defendant through their respective attorneys that citation in error and notice thereof be and the same is hereby expressly waived.

WALKER & WALKER,
C. S. WAGNER, ..
Attorneys for Plaintiff in Error.
KREMER, SANDERS & KREMER, ..
Attorneys for Defendant in Error.

(TITLE OF COURT AND CAUSE.)

No. 286.

Order Granting Writ.

Now May 21, 1920; the plaintiff in the above entitled case having presented his petition for a writ of error to the Circuit Court of Appeals of the United States, in and for the Ninth District, accompanied with an assignment of errors and a prayer for the reversal of the judgment in the above entitled cause,

made, rendered, and entered on the 26th day of November, 1920.

It is ordered that ~~the~~^a writ of error be granted as prayed for upon the furnishing of a good and sufficient bond in the sum of \$300. dollars.

BOURQUIN,

Judge.

*In the District Court of the United States for the
District of Montana.*

MARTIN TROGLIO,

Plaintiff in Error,

vs.

THE BUTTE-SUPERIOR MIN-
ING COMPANY, a corporation,

Defendant in Error.

THE WRIT OF ERROR.

UNITED STATES OF AMERICA—ss.

The President of the United States, Woodrow Wilson, to the Honorable George M. Bourquin, Judge of the District Court of the United States for the District of Montana, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said District Court before you between Martin Troglia, Plaintiff in Error, and The Butte-Superior

ANSWER OF COURT TO WRIT OF ERROR.

The answer of the Honorable, the District Judge of the United States for the District of Montana, to the foregoing writ.

The record and proceedings whereof mention is made with all things touching the same, I certify, under the seal of said District Court, to the Honorable, the United States Circuit Court of Appeals for the Ninth Circuit, within mentioned, at the day and place within contained, in a certain schedule to this writ annexed, as within I am commanded.

By the Court.

C. R. Carlow, Clerk.

By: L. R. Polglase, Deputy.

(SEAL.)

The answer of the Honourable, the District Judge of the District of ...
The court has considered the evidence and is satisfied that the ...
The court has considered the evidence and is satisfied that the ...
The court has considered the evidence and is satisfied that the ...
The court has considered the evidence and is satisfied that the ...
The court has considered the evidence and is satisfied that the ...
The court has considered the evidence and is satisfied that the ...
The court has considered the evidence and is satisfied that the ...
The court has considered the evidence and is satisfied that the ...
The court has considered the evidence and is satisfied that the ...

By J. H. ...
Deputy.

(Seal)

Mining Company, a corporation, Defendant in Error, a manifest error has happened to the damage of Martin Troglio, plaintiff in error, as by said complaint appears, and we being willing that error, if any hath been, should be corrected, and full and speedy justice be done to the parties aforesaid in this behalf, do command you if judgment be therein given, that under your seal you send the record and proceedings aforesaid, with all things concerning the same, to the United States Circuit Court of Appeals for the Ninth Circuit, together with this writ so that you have the same in San Francisco, in the State of California, where said court is sitting, within thirty days from the date hereof, in the said Circuit Court of Appeals to be then and there held, and the record and proceedings aforesaid being inspected, the said United States ~~Circuit~~ Court of Appeals may cause further to be done therein to correct the error what of right, and according to the laws and customs of the United States should be done.

Witness the Hon. Edward D. White, Chief Justice of the United States, this 25th day of May, A. D. 1920.

C. R. GARLOW,

(Seal) Clerk of the United States District Court for

the.....District of Montana.

*In the District Court of the United States for the
District of Montana.*

MARTIN TROGLIO,
Plaintiff in Error,

vs.

THE BUTTE-SUPERIOR MIN-
ING COMPANY, a corporation,
Defendant in Error.

PRAECIPE FOR TRANSCRIPT.

To the Clerk of the above styled Court:

Please prepare transcript in above entitled case returnable to the Circuit Court of Appeals of the United States, for the Ninth district and include thereon the following papers, matters and things:

1.

Plaintiff's complaint.

2.

Defendant's demurrer to plaintiff's complaint.

3.

Order of the court over-ruling defendant's demurrer.

4.

Defendant's answer.

5.

Plaintiff's reply.

6.

Transcript of the testimony as settled and allowed by the court.

7.

Defendant's motion for a directed verdict.

8.

The charge of the Court granting said motion and directing the jury to return a verdict against the plaintiff and in favor of the defendant.

9.

The verdict of the jury.

10.

The judgment on the verdict.

11.

Plaintiff's petition for writ of error. Plaintiff's assignment of errors and prayer for ~~reversal~~ ¹² *Reversal*.

13

Order granting the writ. *and writ*

14

Stipulation waiving citation and all minute entries and orders appearing in the above entitled cause together with the clerk's certificate, certifying to the correctness of the same.

Dated this 24th day of May, 1920.

..... *Walker & Walker* *C. S. Wagner*

Attorneys for Plaintiff in Error.

Martin Troglia, Plaintiff in Error, vs.

The Butte Superior Mining Co., Defendant in Error.

(TITLE OF COURT AND CAUSE.)

No. 286.

Clerk's Certificate.

United States of America,
.....District of Montana.

I, C. A. Garlow, clerk of the United States District Court for the District of Montana, do hereby certify that the foregoing 137 pages presents a true, full and correct copy of the proceedings had and orders entered as therein stated in cause No. 286 wherein Martin Troglia was plaintiff, and the Butte-Superior Mining Company, a corporation, was defendant as the same appears of record and of file in this office, except that the original writ of error and waiver of citation therein at pages 000 and 000, respectively, all of which constitutes the entire transcript of the proceedings in the cause, as per praecipe therefor.

I further certify that a good and sufficient undertaking in due form of law in the sum of three hundred (\$300.00) dollars proved by the judge of said court was duly and regularly filed.

and casts amount of transcript amounting to \$2.60

Witness my official signature and seal of said District at my office in the city of Butte, State of Montana, this the...12.....day of June, A. D. 1920.

and that the same has been paid

.....C. A. Garlow.....

Clerk.

By L. B. Polglare, Deputy.